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Not Approved for Human Consumption: A Study of the Denmark Water Crisis, a Call for Reforming the SWDA, and a Demand for Community Lawyering in Rural America

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NOT APPROVED FOR HUMAN CONSUMPTION: A STUDY OF THE DENMARK WATER CRISIS, A CALL FOR REFORMING THE SDWA, AND A DEMAND FOR COMMUNITY LAWYERING IN RURAL AMERICA

MATTHEW WOODWARD*

INTRODUCTION

Over the past four decades, nine million Americans have ingested dangerous drinking water from a trusted source: their own taps.¹ Each year, “an estimated 16.4 million cases of acute gastroenteritis” are linked to public drinking water.² For many Americans, drinking water—perhaps the most important cornerstone of human health—has become cause for concern.

In Flint, Michigan, this concern turned to panic. In 2014, after toddlers began developing painful skin conditions, children fell seriously ill, and tap water emerged in the form of thick, orange-brown sludge, the people of Flint began to wonder: is there something in the water?³ What soon became known as the Flint Water Crisis drew new attention to the pitfalls of water system mismanagement.⁴ More recently, Newark, New Jersey, has endured its own water crisis, with levels of lead in the city’s drinking water among “the highest recently recorded by a large water system in the United States.”⁵ As in Flint, the response of Newark city authorities has only

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¹ Maura Allaire et al., *National Trends in Drinking Water Quality Violations*, 115 PROC. NAT’L. ACAD. SCI. 2078, 2078 (2018).

² *Id.*

³ Brie D. Sherwin, *Pride and Prejudice and Administrative Zombies: How Economic Woes, Outdated Environmental Regulations, and State Exceptionalism Failed Flint, Michigan*, 88 U. COLO. L. REV. 653, 657 (2017).

⁴ Zainab Sultan, *Newark, ‘The Next Flint,’ and Water-Crisis Coverage*, COLUM. JOURNALISM REV. (Sept. 12, 2019), https://www.cjr.org/united_states_project/newark-flint-water-lead.php [<https://perma.cc/LBH9-ZKR2>].

⁵ *Newark Drinking Water Crisis*, NAT’L RES. DEF. COUNCIL, <https://www.nrdc.org/newark-drinking-water-crisis> [<https://perma.cc/7M8N-KKGS>] (last visited Mar. 10, 2021).

compounded the problem, with some residents drinking the tainted water for twenty-one months before receiving a water filter.⁶

Water issues in places like Flint and Newark have drawn deserved media attention and sparked a discussion of health, equity, and access in America's cities.⁷ Missing from this discussion about America's water management, however, are the nearly twenty percent of Americans that live in rural areas.⁸ In real numbers, this translates to roughly 60 million people who, like most other Americans, depend on public water supplies for survival.⁹

While Flint, Newark, and other big-city water crises may have justifiably increased awareness,¹⁰ the reality is stark: drinking water problems disproportionately affect rural areas over urban or suburban areas.¹¹ Furthermore, research shows that within these disproportionately affected rural areas, it is specifically low-income communities which suffer from the greatest risk of ingesting unsafe water.¹² The designation of "low-income, rural area" includes millions of people, making the problem of clean drinking water in these areas a profoundly impactful one.

Through an analysis of ongoing drinking water issues in the rural community of Denmark, South Carolina, this Note presents a discussion of the hurdles America's low-income, rural communities face in the fight for clean drinking water. Part I of this Note places Denmark and its water issues in context. Part II provides an overview of specifically low-income, rural challenges, arguing that a combination of ineffective enforcement under the Safe Drinking Water Act ("SDWA") and inadequate responses to water issues have resulted in a uniquely rural water crisis nationwide. Part III documents these structural causes and responses to the water crisis in Denmark. Finally, Part IV advocates reforms to the SDWA and a

⁶ Courtney Lindwall, *Inside the Fight for Clean Water in Newark*, NAT'L RES. DEF. COUNCIL (May 21, 2019), <https://www.nrdc.org/stories/inside-fight-clean-water-newark> [<https://perma.cc/5PJX-JDSW>].

⁷ See, e.g., Sherwin, *supra* note 3, at 656.

⁸ U.S. CENSUS BUREAU, MEASURING AMERICA: OUR CHANGING LANDSCAPE (2016), <https://www.census.gov/library/visualizations/2016/comm/acs-rural-urban.html> [<https://perma.cc/F2AA-DASM>].

⁹ Press Release, U.S. Census Bureau, New Census Data Show Differences Between Urban and Rural Populations (Dec. 8, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-210.html> [<https://perma.cc/7SQN-EF29>].

¹⁰ Debi Ores, *Thirsty for Justice: The Fight for Safe Drinking Water*, 25 HASTINGS ENV'T L.J. 101, 101 (2019).

¹¹ Allaire et al., *supra* note 1, at Fig. 3.

¹² *Id.* at 2080.

strategy of community inclusion to secure clean water in Denmark and across rural America.

I. DENMARK, SOUTH CAROLINA: CONTEXT AND THE BEGINNINGS OF A CRISIS

A. *Denmark: A Rural Community in Distress*

Denmark, South Carolina, is a city of approximately 3,100 people located within Bamberg County.¹³ Denmark's population is majority-minority, with more than eighty percent of the city's residents identifying as Black or African American.¹⁴ Roughly fifty miles from Columbia and one hundred miles from Charleston¹⁵—two of the state's main population centers—Denmark is isolated. Historically a trading and market center, the city's "progress [has] ebbed and flowed with the rural agricultural economy" since its founding.¹⁶

As this history suggests, economic insecurity remains an unfortunate reality for present-day Denmark and Bamberg County. As detailed in a 2019 State of South Carolina report, in 2018 Bamberg County endured an unemployment rate of 6.5%, nearly double the state rate of around 3.5%.¹⁷ Similarly, the poverty rate within Denmark is an alarming 35%,¹⁸ considerably higher than the already high South Carolina-wide figure of 15.4%.¹⁹ Within Denmark, the median household income is \$25,250,²⁰ notably below the federal poverty threshold of \$26,200 for a family of

¹³ *Denmark City, South Carolina*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?q=Denmark%20city,%20South%20Carolina&g=1600000US4519105> [<https://perma.cc/SLM5-PFTH>] (last visited Mar. 10, 2021).

¹⁴ *Id.*

¹⁵ Approximate Distance from Denmark, SC to Columbia, SC. GOOGLE MAPS, <http://maps.google.com> [<https://perma.cc/VCU9-6Y8B>] (follow "Directions" hyperlink; then search starting point field for "Denmark, SC" and search destination field for "Columbia, SC"); Approximate Distance from Denmark, SC to Charleston, SC. GOOGLE MAPS, <http://maps.google.com> [<https://perma.cc/VCU9-6Y8B>] (follow "Directions" hyperlink; then search starting point field for "Denmark, SC" and search destination field for "Charleston, SC").

¹⁶ Robert A. Pierce, *Denmark*, S.C. ENCYCLOPEDIA (May 17, 2016), <http://www.scencyclopedia.org/sce/entries/denmark> [<https://perma.cc/7Q5Z-UPAV>].

¹⁷ CMTY PROFILE: BAMBERG CNTY., BUS. INTEL. DEP'T, S.C. DEP'T OF EMP. & WORKFORCE, 1 (2019), <https://lmi.dew.sc.gov/lmi%20site/Documents/CommunityProfiles/04000009.pdf> [<https://perma.cc/WK5W-7FGK>].

¹⁸ U.S. CENSUS BUREAU, *supra* note 13.

¹⁹ *South Carolina: 2018*, TALK POVERTY, <https://talkpoverty.org/state-year-report/south-carolina-2018-report/> [<https://perma.cc/MCL6-TKPQ>] (last visited Mar. 10, 2021).

²⁰ U.S. CENSUS BUREAU, *supra* note 13.

four.²¹ More than just shocking numbers, this dire economic situation has far-reaching effects—as levels of concentrated poverty “contribut[e] to poor housing and health conditions, higher crime and school dropout rates, and employment dislocations.”²² In short, the prevalence of poverty in a place like Denmark creates a web of challenges that go far beyond “individual circumstances.”²³

B. Denmark’s Drinking Water—A Problem Long in the Making

The South Carolina Department of Health and Environmental Control (“DHEC”) defines Denmark’s water system as “a small rural water system.”²⁴ Like many such systems within the state, Denmark receives its water from wells, which in turn draw groundwater from an aquifer located nearly 300 feet below ground.²⁵ Before August of 2018, Denmark was served by four individual wells.²⁶ In August of 2018, one of these wells, referred to as the Cox Mill well, was taken out of service,²⁷ leaving the city with three functioning water sources.

While the removal of the Cox Mill well from the city’s system has come to represent the Denmark Water Crisis, problems began with years of customer complaints and state reprimands for repeated violations. For nearly a decade, Denmark residents “have been suspicious of the rust-colored water” which came from their taps.²⁸ Residents repeatedly contacted city administrators and water system administrators but were repeatedly told by both Denmark and South Carolina officials that the water was safe to consume.²⁹

²¹ *2020 Poverty Guidelines*, OFF. OF THE ASSISTANT SEC’Y FOR PLAN. & EVALUATION, U.S. DEP’T OF HEALTH & HUMAN SERVICES, <https://aspe.hhs.gov/2020-poverty-guidelines> [<https://perma.cc/22KL-UVF8>] (last visited Mar. 10, 2021).

²² *Rural Poverty & Well-Being*, ECON. RSCH. SERV., U.S. DEP’T OF AGRIC., <https://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/> [<https://perma.cc/R69E-TR9P>] (last updated Aug. 20, 2019).

²³ *Id.*

²⁴ *Denmark Public Water System*, S.C. DEP’T OF HEALTH & ENV’T CONTROL, <https://scdhec.gov/environment/your-water-coast/denmark-public-water-system> [<https://perma.cc/L7XA-X3SJ>] (last updated Dec. 9, 2020).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Sara Ganim, *For 10 Years, A Chemical Not EPA Approved Was in Their Drinking Water*, CNN (Nov. 28, 2018), <https://www.cnn.com/2018/11/11/health/denmark-sc-water-chemical-not-epa-approved/index.html> [<https://perma.cc/U9WP-MPWT>].

²⁹ *Id.*

Behind these assurances, however, City and State officials were aware as early as 2010 that the City's water system was rife with problems. Based on findings from two annual monitoring surveys conducted by DHEC in 2009, Denmark was issued a consent order in 2010, documenting both the numerous violations observed during the surveys and a high volume of customer complaints regarding the city's water to DHEC.³⁰ As detailed in the consent order, DHEC inspectors analyzed Denmark's community water system ("CWS") twice over the course of 2009, each time grading the CWS as "unsatisfactory."³¹ Among the eighteen individual violations noted in both surveys, inspectors repeatedly found that standard water quality assurance tools such as flushing and leak detection were unsatisfactory because they simply did not exist: Denmark was operating its CWS without these safety protocols.³²

More than just mere noncompliance and inaction, Denmark CWS officials also did not have a full handle over the general administration of the system. The 2009 inspectors pointed to an absence of "adequate record keeping" and fundamental management deficiencies, such as the lack of an accurate system map, as justification for the ensuing "unsatisfactory" rating in both 2009 surveys for "basic operation and control" over the whole of the CWS.³³

These problems persisted into 2011, with Denmark again receiving an "unsatisfactory" rating for the management of its CWS and "needs improvement" rating for its overall water quality in an annual survey from that year.³⁴ In the survey report, DHEC inspectors noted the continuance of "discoloration issues" and significant violations of nearly every category.³⁵ For example, Denmark's CWS remained without any semblance of a flushing program—a basic safety measure described by inspectors as "vital."³⁶ While recommending that Denmark immediately adopt "a rigorous . . . system-wide flushing program," the 2011 survey echoed the one conducted in 2009, finding that the town had "failed to adequately and consistently address this deficiency"³⁷ despite its inclusion in every annual survey over the past five years.

³⁰ *Id.*

³¹ Consent Order, No. 10-00-DW City of Denmark Public Water System, 2–3 (S.C., Dep't Health & Env't, Jan. 25, 2010).

³² *Id.*

³³ *Id.*

³⁴ S.C. DEPT OF HEALTH & ENV'T CONTROL, 2011 TOWN OF DEN. SANITARY SURVEY 1,3 (2011).

³⁵ *Id.*

³⁶ *Id.* at 4.

³⁷ *Id.*

The 2011 survey also contained more concerns over administration, with inspectors noting that the Town of Denmark only employed one licensed CWS operator and that its staffing rating of “needs improvement” was chiefly due to the failure “to continuously manage system maintenance in a proactive manner.”³⁸ While the findings of the 2011 report would eventually create their own controversy, then-state regulators mysteriously removed the 2010 Consent Order in 2013, having hastily concluded that Denmark had fulfilled its requirements.³⁹

Five years after the removal of the consent order, 2018 brought a new level of scrutiny to Denmark’s drinking water. While the 2011 survey alleged an overall reduction in the number of citizen complaints related to discolored water,⁴⁰ an ensuing increase in complaints over the following seven years and an acrimonious April 2018 community meeting led DHEC to perform a special sampling study of Denmark’s four wells.⁴¹ In large part, the impetus of this study was community anger related to rumors of elevated levels of lead, iron, manganese, and copper within the town’s drinking water supply.⁴² Ultimately, however, the April 2018 study simply concluded that there were no “significant issues with the water quality at any of the public wells serving the City of Denmark.”⁴³

Months later, in August 2018, the veneer of safety in Denmark’s water system began to crack. After the 2018 study disclosed that a chemical known as “HaloSan” was being used in the form of “automatic injection” tablets at the Cox Mill well,⁴⁴ watchdog forces in the state took notice. In August 2018, researchers at Clemson University’s Department of Pesticide Regulation—which oversees the use of pesticides within the state—ordered the immediate end to the use of HaloSan as a water additive in Denmark.⁴⁵

C. *What Is HaloSan and Why Did Denmark Use It?*

The mandated end of HaloSan use and Denmark’s subsequent closure of the Cox Mill well began to raise a serious question in Denmark:

³⁸ *Id.* at 6.

³⁹ Letter from Daniel S. Malonza, Drinking Water Enf. Section, S.C. Dep’t of Health & Env’t Control, to Dr. Gerald Wright, Mayor of Denmark (Apr. 11, 2013), https://www.scdhec.gov/sites/default/files/media/document/consent-order-met_2013.05.11.Denmark.pdf [<https://perma.cc/5QLF-33C5>].

⁴⁰ S.C. DEP’T OF HEALTH & ENV’T CONTROL, *supra* note 34, at 3.

⁴¹ BUREAU OF WATER, S.C. DEP’T OF HEALTH & ENV’T CONTROL, STUDY OF WATER QUALITY OF PUBLIC WELLS SERVING CITY OF DENMARK’S PUBLIC WATER SYSTEM 3 (2018).

⁴² *Id.* at 5.

⁴³ *Id.* at 13.

⁴⁴ *Id.* at 7.

⁴⁵ Ganim, *supra* note 28.

What exactly is HaloSan?⁴⁶ HaloSan is a commercial brand name for a class of chemicals known as Halohydanatoins.⁴⁷ As detailed in a 2007 U.S. Environmental Protection Agency (“EPA”) risk assessment report, these chemicals are volatile skin and eye irritants, can cause severe internal bleeding, and are highly toxic when inhaled.⁴⁸ According to the EPA, Halohydanatoins are effective in an array of industrial uses such as toilet bowl cleaning products, photo processing agents, and pulp paper mill systems so long as the proper safety protocols are implemented.⁴⁹ However, none of the suggested uses for these chemicals involves ingestion by human beings. Accordingly, the 2007 EPA report officially classified Halohydanatoins—the active chemical in HaloSan—as a pesticide.⁵⁰ Because of this classification and widespread use as an industrial chemical, HaloSan has never even been tested as a drinking water additive and therefore carries no EPA approval for such application.⁵¹

The extreme toxicity of HaloSan, its health risks, and its subsequent lack of EPA approval for applications within drinking water systems,⁵² makes its use in Denmark’s CWS profoundly troubling. Incredibly, despite the well-documented risks of HaloSan within a then four-year-old official EPA report,⁵³ the 2011 survey of Denmark’s CWS acknowledges the use of HaloSan without calling for its removal from the system. Instead, 2011 inspectors document other problems within the CWS⁵⁴ and mention only that staff tasked with administering HaloSan to the Cox Mill well are “unfamiliar with [its] function” and that the information related to the well’s self-check “is not documented.”⁵⁵ Glaringly, this 2011 report—published seven years before the forced closure of the Cox Mill well—also vaguely points out the availability of an unnamed, indeterminate “HaloSan residual test kit” but notes that it “is not utilized by [Denmark’s] system.”⁵⁶ Thus, according to the 2011 report, not only were Denmark CWS administrators

⁴⁶ S.C. DEP’T OF HEALTH & ENV’T CONTROL, *supra* note 34.

⁴⁷ EPA, REGISTRATION ELIGIBILITY DECISION FOR HALOHYDANATOINS (CASE 3055) 1 (2007).

⁴⁸ *Id.* at 13.

⁴⁹ *Id.* at 7–8.

⁵⁰ Letter from Frank T. Sanders to Registrant (Sept. 2007), *in* EPA, REGISTRATION ELIGIBILITY DECISION FOR HALOHYDANATOINS (2007).

⁵¹ Ganim, *supra* note 28.

⁵² See EPA, *supra* note 47, at 13.

⁵³ *Id.*

⁵⁴ See *infra* Section I.A; S.C. DEP’T OF HEALTH & ENV’T CONTROL, *supra* note 34, at 6 (calling the 2011 violations “significant” in nature and referring Denmark’s CWS to DHEC’s Drinking Water Enforcement section).

⁵⁵ S.C. DEP’T OF HEALTH & ENV’T CONTROL, *supra* note 34, at 2.

⁵⁶ *Id.* (not identifying or further discussing the HaloSan testing kit described in the report).

putting an industrial pesticide not approved for human consumption into the CWS, administrators were also not providing adequate training or application procedures to mitigate its well-documented, serious health risks.

In 2018, as Denmark's use of HaloSan began to gain minor media attention, state regulators and Denmark city officials began offering mysteriously vague justifications for its use. A South Carolina DHEC spokesperson insisted without evidence that HaloSan had "been advertised as an effective treatment."⁵⁷ Echoing this rationale, Denmark Mayor, Gerald Wright, claimed that "it was our thinking that it was an approved chemical."⁵⁸ Further, Mayor Wright seemed to ignore Denmark's role as an administrator of its own CWS and to deflect any responsibility for HaloSan use—saying only that Denmark "rel[ies] totally on DHEC . . . they have the responsibility and expertise."⁵⁹ Apart from highlighting the disastrous levels of ignorance behind Denmark's introduction of an EPA-classified pesticide⁶⁰ to an already imperiled water system, these statements reveal a more pressing danger for rural CWSs and the communities that rely on them: a blinding degree of regulatory confusion.

II. A UNIQUELY RURAL PROBLEM

A. *Drinking Water Barriers in Rural Communities*

Denmark's failure to maintain its water system is not unique among other low-income rural areas. Specifically, Mayor Wright's evasive suggestion that a South Carolina state agency, DHEC, retains legal responsibility over Denmark's CWS and its use of HaloSan simply because they have the "expertise"⁶¹ exemplifies a troubling broader trend: rural places are fumbling when it comes to regulations on drinking water and environmental practices.

Low-income, rural communities face a threshold hurdle to drinking water compliance: money.⁶² "[L]imited financial resources" has been highlighted as a major cause of the serious compliance issues found in many rural CWSs.⁶³ These places, like Denmark, suffer from a range of economic woes that directly impact their ability to effectively manage a

⁵⁷ Ganim, *supra* note 28.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ EPA, *supra* note 47, at 13.

⁶¹ Ganim, *supra* note 28.

⁶² Allaire et al., *supra* note 1, at 2082.

⁶³ *Id.*

CWS. With low tax revenues and a lack of access to infrastructure loans due to lower credit scores, America’s “Denmarks” are broadly struggling to provide basic services, including maintaining and overseeing their CWS infrastructure.⁶⁴

Compounding these concerns and the focus of this Note is the maze of regulatory and enforcement responsibility for low-income, rural communities. In effect, the distressed financial situation of places like Denmark means that CWS officials and administrators face three connected hurdles in meeting the standards of the SDWA: (1) improperly assessing regulatory responsibility; (2) a financial inability to secure adequate management; and (3) a lack of incentives to accurately report CWS violations.⁶⁵

1. The SDWA on Paper

In 1974, Congress passed the SDWA, with a goal of “protect[ing] public health.”⁶⁶ In large part, the SDWA allows the EPA to set standards to ensure water quality.⁶⁷ However, the SDWA merely places the EPA into a role as an “administrator”⁶⁸ and encourages states to step into a day-to-day oversight role through what has become known as the Act’s “state primacy” provision.⁶⁹ This provision allows a state, after meeting seven individual requirements, to obtain the “primary enforcement responsibility” for its water systems.⁷⁰ An applicant state must implement state water regulations that are “no less stringent” than the national standards set by the EPA⁷¹ and must implement procedures that provide for the “enforcement of such state regulations” including monitoring and inspections.⁷²

For the forty-nine states—including South Carolina⁷³—that have received this designation, responsibilities abound. These include: “mak[ing]

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Understanding the Safe Drinking Water Act*, EPA, <https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf#:~:text=Understanding%20the%20Safe%20Drinking%20Water%20Act.%20The%20Safe,sources%E2%80%94rivers,%20lakes,%20reservoirs,%20springs,%20and%20ground%20water%20wells> [https://perma.cc/6HVH-6M7M] (last visited Mar. 10, 2021).

⁶⁷ *Id.*

⁶⁸ 42 U.S.C. § 300(f)(7) (2018).

⁶⁹ *Id.* § 300g-2; EPA, *supra* note 66.

⁷⁰ 42 U.S.C. § 300g-2(a) (2018).

⁷¹ *Id.* § 300g-2(a)(1).

⁷² *Id.* § 300g-2(a)(2).

⁷³ EPA, *supra* note 66 (Wyoming and Washington, D.C. have yet to adopt primacy).

sure water systems test for contaminants, review[ing] plans for water system improvements, conduct[ing] on-site inspections and sanitary surveys, provid[ing] training and technical assistance, and tak[ing] action against water systems not meeting standards.”⁷⁴

Critically, states must manage these obligations among towns, cities, and other localities. Following a 1996 amendment to the SDWA, the EPA began publishing guidelines which set forth the “minimum standards” required for the “operators” of community water systems to be certified.⁷⁵ Despite this provision, the term “operator”—seemingly referring to an individual or department that maintains local control over a CWS—is not defined elsewhere within the text of the SDWA. In some instances, the meaning of this term has even been left for court evaluation, resulting in sometimes surprising delegations of operator responsibility.⁷⁶

While SDWA can be considered and praised as an example of groundbreaking environmental regulation,⁷⁷ its blunt handover of enforcement responsibility to states and the ensuing array of ambiguities have created both financial and enforcement problems that disproportionately impact low-income areas, especially ones in rural regions. However, even if Denmark leaders were properly informed of their duties as they relate to primacy or the SDWA more generally, there remains two more basic financially sensitive challenges to compliance: management and reporting.

2. The SDWA's Managerial Burden

The dire financial situation confronting communities like Denmark results in a fundamental challenge. The costs associated with daily testing and monitoring under the SDWA can themselves become a barrier to enforcement. States tasked with overseeing the SDWA through the primacy provision have struggled to help local municipalities comply, with some states assembling their own frameworks for subsidizing CWS operations. Known as “SDWA Fees,” these schemes are generally designed to ensure adherence to the SDWA on the local, CWS level, but many leave significant gaps in compliance related to daily operations and monitoring.⁷⁸

⁷⁴ *Id.*

⁷⁵ 42 U.S.C. § 300g-8 (2018).

⁷⁶ *See, e.g.,* United States v. Ritz, 772 F. Supp. 2d 1017, 1022 (S.D. Ind. 2011) (holding that owner-supervisor of resort and campground was an “operator” under the SDWA).

⁷⁷ *See, e.g.,* Richard Weinmeyer et al., *The Safe Drinking Water Act of 1974 and Its Role in Providing Access to Safe Drinking Water in the United States*, 19 AMA J. ETHICS 1018, 1018 (2017) (heralding the SDWA as an “invaluable regulatory framework”).

⁷⁸ *See, e.g.,* S.C. DEPT OF HEALTH & ENV'T CONTROL, SUMMARY OF SDWA FEE

Under South Carolina's regime, for example, CWS administrators must pay fees of up to \$28,000 per year to guarantee yearly testing by DHEC but retain much of the daily administrative burden in operating a CWS.⁷⁹

Under the SDWA fee system, CWS administrators also pass costs along to customers. In South Carolina, costs associated with the SDWA fee system are assessed on a "per-tap" basis and are tacked onto customers' water bill.⁸⁰ While these fees may appear trivial, their mere existence is cause for concern. It is ludicrous that under the SDWA, municipalities and taxpayers must hand over additional money for the fundamental guarantee of drinking poison-free water.

SDWA fee programs in state-primacy provision states also present a more practical problem for monitoring: a communicative disconnect between the local agencies tasked with CWS monitoring and the state agency tasked with broader, CWS oversight. In South Carolina, SDWA fees guarantee DHEC's emergency oversight, with state authorities available on a round-the-clock basis "in the event of a water quality crisis in the state."⁸¹ However, this designed ameliorative or assistance function on the part of a state agency presupposes that CWS administrators on the local, monitoring level are aware of violations within their systems—much less willing to report known problems to the proper state authorities.

Indeed, this intended collaboration between local CWS administrators and state agencies under state primacy overlooks the harsh economic realities that are inescapable in rural places like Denmark. It is difficult to imagine that Denmark—home to CWS without adequate training or instruction—is realistically capable of meeting the demands of the SDWA. In addition to the array of barriers to discovering problems at their outset, rural, low-income communities can face increased costs when problems are eventually discovered.⁸² This dynamic in turn creates a dangerous incentive not to report drinking water problems—a dynamic that alone robs SDWA fee structures of their efficacy.

SERVICES—FISCAL YEAR 2020, 1 (2019); *Safe Drinking Water Fee*, MINN. DEP'T OF HEALTH, <https://www.health.state.mn.us/communities/environment/water/com/scf.html> [<https://perma.cc/KD4N-BZDV>] (last visited Mar. 10, 2021); CONN. DEP'T OF PUB. HEALTH, SAFE DRINKING WATER PRIMACY SUMMARY (2019).

⁷⁹ S.C. DEP'T OF HEALTH & ENV'T CONTROL, *supra* note 34, at 2–3 (noting Denmark's failure to adequately staff its CWS and conduct required training.)

⁸⁰ S.C. DEP'T OF HEALTH & ENV'T CONTROL, FY 2020 SAFE DRINKING WATER ACT FEE SCHEDULE (2019).

⁸¹ S.C. DEP'T OF HEALTH & ENV'T CONTROL, *supra* note 78.

⁸² Allaire et al., *supra* note 1, at 2083.

3. The SDWA's Reporting Burden

The multilayered nature SDWA's enforcement responsibility under state primacy provides a healthy habitat for confusion. Chiefly, this confusion has been manifested as uncertainty over the funding responsibility for daily operations. However, an additional problem lurks: a financially connected failure to adequately report violations. While in Denmark the City maintained day-to-day control over the CWS and the State of South Carolina and DHEC retained oversight ability,⁸³ there appears to have been little clarity over which entity was tasked with reporting violations. Though Mayor Wright insists that Denmark was wholly reliant on DHEC's vaguely defined "expertise,"⁸⁴ for enforcement and management, it is unclear if Denmark City leaders were aware of their reporting obligations. Indeed, by blindly delegating responsibility through state primacy, the SDWA has both created an air of uncertainty around reporting and fatally placed the onus of reporting onto local CWS administrators.

Under the SDWA and its primacy provision, there are two primary reporting requirements. First, the primacy option demands that participating states maintain a consistent schedule of reporting—states must keep records and make reports of activities that relate to the promulgation of state-level standards and ongoing enforcement.⁸⁵ When a CWS within a primacy state commits a violation that has "the potential to have serious adverse effects on human health," the CWS must provide notice within twenty-four hours to the state, its own customers and the EPA.⁸⁶ Second, the SDWA requires a CWS to provide its customers with an annual "consumer confidence report" that, along with other information, summarizes the presence of any contaminants within the system, their health risks, and steps taken by the CWS to eliminate the contamination.⁸⁷

Despite these commands within the text of the SDWA, evidence shows that overall, America's CWSs are failing to meet these reporting requirements.⁸⁸ As recently as 2015, approximately 77 million Americans consumed water from systems that were in serious and open violation of

⁸³ S.C. DEP'T OF HEALTH & ENV'T CONTROL, *supra* note 34, at 6 (noting Denmark failed in its responsibility to adequately hire and train current CWS employees).

⁸⁴ *Id.*; Ganim, *supra* note 28.

⁸⁵ 42 U.S.C. § 300g-2(a)(1) (2018); *id.* § 300g-2(a)(2); *id.* § 300g-2(a)(3).

⁸⁶ 42 U.S.C. § 300g-3(c)(2)(C) (2018); *id.* § 300g-3(c)(2)(C)(I).

⁸⁷ 42 U.S.C. § 300g-3(c)(4)(A) (2018).

⁸⁸ Jacey Fortin, *America's Tap Water: Too Much Contamination, Not Enough Reporting, Study Finds*, N.Y. TIMES (May 4, 2017), <https://www.nytimes.com/2017/05/04/us/tapwater-drinking-water-study.html> [<https://perma.cc/V2KW-MTUT>].

the SDWA.⁸⁹ The growing tendency of CWSs to stray from the SDWA's baseline violation reporting requirements⁹⁰ has alone worsened other drinking water issues, with EPA audits finding a pattern of "widespread underreporting of violations" that raises significant barriers to adequate enforcement.⁹¹ If regulators—federal or state—are not made aware of SDWA violations, there cannot be any corrective action. Addressing this issue directly, the 2013 National Public Water Systems Compliance Report indicates America's water system "violation data [is] substantially incomplete,"⁹² a statement that is cause for serious concern given the necessity of data for effective enforcement.

In short, states and CWS operators are not reporting violations—even as these violations represent serious community health threats. Notably, the mechanics of the SDWA's forced relationship between local CWS operators, state authorities, and the federal EPA have created what has been described as a glorified "honor code" that allows serious problems to remain unaddressed and invisible in official records.⁹³ Flint, Michigan's lead-tainted water crisis offers a grim illustration of this system. While testing by third-party nonprofit groups infamously found high levels of toxic lead in Flint's water, the city's water system officially "had no reported violations" of the EPA and SDWA regulations.⁹⁴

Within this so-called "honor code" of reporting, distressed rural localities may be particularly incentivized to refrain from reporting violations—an incentive that is tied to their financial reality.⁹⁵ For states that have been assigned "primary enforcement responsibility"⁹⁶ under the state-primacy mechanism, the SDWA commands state agencies to "adopt authority for administrative penalties."⁹⁷ In systems that carry water to a community of more than 10,000, for example, the provision requires that states impose a penalty on the offending CWS that is "not

⁸⁹ *Id.*

⁹⁰ KRISTI PULLEN FEDINICK ET AL., NAT'L RES. DEF. COUNCIL, THREATS ON TAP: WIDESPREAD VIOLATIONS HIGHLIGHT NEED FOR INVESTMENT IN WATER INFRASTRUCTURE AND PROTECTIONS 7 (2017), <https://www.nrdc.org/sites/default/files/threats-on-tap-water-infrastructure-protections-report.pdf> [<https://perma.cc/R8EU-UL83>].

⁹¹ *Id.*

⁹² EPA, 2013 NATIONAL PUBLIC WATER SYSTEMS COMPLIANCE REPORT, 3 (2013), <https://www.epa.gov/sites/production/files/2015-06/documents/sdwacom2013.pdf> [<https://perma.cc/6TVG-DWEA>].

⁹³ FEDINICK ET AL., *supra* note 90, at 7.

⁹⁴ *Id.* at 6.

⁹⁵ Allaire et al., *supra* note 1, at 2082–83; FEDINICK ET AL., *supra* note 90, at 7.

⁹⁶ 42 U.S.C. § 300g-2 (a) (2018).

⁹⁷ *Id.* § 300g-2 (a)(6) (2018).

less than \$1,000 per day, per violation.”⁹⁸ However, for CWSs that serve smaller populations, such as Denmark’s and those of many of rural places, the SDWA extends considerable leeway to states in assessing penalties—proscribing that these systems be fined amounts that are “adequate to ensure compliance.”⁹⁹ Given mandated penalties for violations and the statutory unknowns for the small CWSs that often serve rural communities, it is unsurprising that many CWSs—large and small—chronically underreport SDWA violations.

Underreporting can include failing to internally document the violation or, perhaps most seriously, failing to report the violation to the EPA as required.¹⁰⁰ A litany of “financial barriers to accurate violation reporting and compliance”¹⁰¹ may mean that for states and CWS administrators who are in violation of SDWA provisions, remaining silent—even if these violations threaten community health—may be the only affordable option.

In combination, basic barriers to enforcement, a confusing patchwork of responsibilities under the SDWA, and incentives to keep violations quiet have left rural America’s drinking water safety in question. In South Carolina, this conspicuous lack of interagency collaboration amid the chaos and costs of SDWA enforcement would combine with an ineffective legal response to create the Denmark Water Crisis.

III. BREAKDOWN AND FALLOUT IN DENMARK

Once the closure of Denmark’s Cox Mill well was announced in August 2018,¹⁰² two disparate responses emerged: one emanating from government and another emanating from the local community. However, Denmark’s water struggles did not begin in 2018. Rather, the Denmark Water Crisis is rooted in a lack of government response and communication ten years prior to closure of the Cox Mill well.

Glaringly, both Denmark officials and South Carolina DHEC officials were aware in 2011 of HaloSan’s use at the Cox Mill well.¹⁰³ Further still, the DHEC report from that year expresses concern that those

⁹⁸ *Id.* § 300g-2(a)(6)(A) (2018).

⁹⁹ *Id.* § 300g-2(a)(6)(B) (2018).

¹⁰⁰ *Id.* § 300g-3(c)(1)(A)(i–ii); FEDINICK ET AL., *supra* note 90, at 7.

¹⁰¹ Allaire at el., *supra* note 1, at 2082–83.

¹⁰² S.C. DEP’T OF HEALTH & ENV’T CONTROL, *supra* note 24, at 1.

¹⁰³ *See supra* Section I.C.

tasked with administering HaloSan tablets to Denmark's water system had not received appropriate training.¹⁰⁴ The 2011 report is damning when placed within a chronology: it was published four years after the 2007 EPA decision on Halohydanatoin, in which the agency officially classified HaloSan-type compounds a pesticide unfit for human consumption and advised heavy precautions even when using the chemicals in industrial applications.¹⁰⁵

Somehow, DHEC inspectors did not respond to an available, official federal publication that explicitly cautioned against using HaloSan in applications like CWS management. This egregious lack of basic inter-agency communication and ensuing regulatory ignorance is cause for extreme concern. While the SDWA's state primacy provision expressly grants states "primary enforcement responsibility,"¹⁰⁶ Denmark's use of HaloSan indicates that it does little to foster communication channels between states and the EPA regarding even the salient information for CWS operators: dangerous chemicals that should be avoided. Indeed, a background failing of collaboration between local, state, and federal agencies has lurked behind the Denmark Water Crisis at every stage and into the present.

A. *Official Denials*

Notably, people in Denmark believed there was something wrong with their drinking water well before the Cox Mill well was officially closed. Years of complaints about water quality and discoloration simply came to head in early 2018.¹⁰⁷ In January of that year, Dr. Marc Edwards, a noted water quality expert involved with testing in Flint, Michigan and Washington, D.C., offered to perform a series of bacterial tests on Denmark's wells.¹⁰⁸ After initially expressing a willingness for Edwards to proceed, Mayor Wright reversed course and insisted that outside testing was not needed and that he would not allow it to go forward.¹⁰⁹ Implicitly pointing to the structure of SDWA enforcement within South Carolina, Mayor Wright boldly declared that having an outside entity conduct water

¹⁰⁴ S.C. DEPT OF HEALTH & ENV'T CONTROL, *supra* note 34, at 2.

¹⁰⁵ See EPA, *supra* note 47, at 12–13.

¹⁰⁶ 42 U.S.C. § 300g-2(a) (2018).

¹⁰⁷ Ganim, *supra* note 28.

¹⁰⁸ Sammy Fretwell, *Small town SC mayor won't let Flint water crisis researcher test wells for pollution*, THE STATE (Jan. 24, 2018), <https://www.thestate.com/news/local/article196354779.html> [<https://perma.cc/V8L7-HUWC>].

¹⁰⁹ *Id.*

testing would be “an insult to DHEC” and would serve only as a vehicle for unspecified “motivation[s].”¹¹⁰

Even after Denmark’s inexplicable use of HaloSan was finally disclosed and the Cox Mill well was closed, Mayor Wright and other local government leaders continued to speak from a position of defiance. In November 2019, after the mandated closure of the Cox Mill well due to HaloSan use, the levying of an additional \$4,000 DHEC fine for Denmark’s ongoing failure to address serious system-wide issues,¹¹¹ and a visit from 2020 presidential candidate Bernie Sanders to distribute bottled water in Denmark,¹¹² Mayor Wright remained unwilling to admit any fault on the part of Denmark city officials, saying flatly that Denmark had “never distributed water that was unsafe.”¹¹³

Incredibly, Mayor Wright and Denmark officials have extended their handling of Denmark’s HaloSan problems to the current, ongoing problems faced by the water system. Despite continued complaints about water quality,¹¹⁴ Denmark leaders have characterized an additional 2019 consent order related to inadequate contamination-control measures as a normal “part of the process that ensures water quality is fine.”¹¹⁵ However, administrative action in the form of a consent order that documents malfunctioning fire hydrants, inadequate backflow controls, and a lack of system flushing should certainly not be considered a normative part of the “process” to provide clean drinking water.¹¹⁶

B. Community Anger

While Mayor Wright, Denmark officials, and DHEC administrators remain noncommittal at best in their handling of Denmark’s HaloSan

¹¹⁰ *Id.*

¹¹¹ Gene Zaleski, *Denmark facing \$4,000 DHEC fine for not addressing water system deficiencies; order not about water quality*, THE TIMES & DEMOCRAT (July 13, 2019), https://thetandd.com/news/local/denmark-facing-4-000-dhec-fine-for-not-addressing-water-system-deficiencies-order-not-about/article_87fc4635-6d9a-517b-ac69-f231bad723d5.html [<https://perma.cc/W9JR-935E>].

¹¹² Bristow Marchant, *Bernie Sanders campaign to hand out bottled water in Denmark a week after SC visit*, THE CHARLOTTE OBSERVER (May 24, 2019), <https://www.charlotteobserver.com/news/state/south-carolina/article230757269.html> [<https://perma.cc/LD4S-H38B>].

¹¹³ Loren Thomas, *Water concerns continue to plague the City of Denmark after controversial chemical taken out of system*, WLTX (Nov. 26, 2019), <https://www.wltx.com/article/news/city-of-denmark-to-upgrade-aging-water-system/101-d4ac140b-7439-44be-8f8f-93354c015609> [<https://perma.cc/7N7T-A54V>].

¹¹⁴ Zaleski, *supra* note 111.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

misuse and continuing CWS issues, the people of Denmark continue to exhibit a dogged determination in the fight for clean drinking water—despite the apparent futility of their efforts. Of course, the ongoing legal and political reckoning known as the Denmark Water Crisis would not exist without the vigilance of Denmark’s citizens. At its core, the crisis was brought to light by citizen pressure alone. It was continuous complaints which led the DHEC to allow the fateful 2018 survey that revealed the use of HaloSan.¹¹⁷ It was also a coalition of concerned Denmark residents that attempted to engage Dr. Marc Edwards in ongoing water quality testing and has continued to exert pressure on Mayor Wright and other officials.¹¹⁸

More substantively, the admirable perseverance of Denmark’s citizens has been channeled into real legal and political action. Two separate class action suits have been filed—and have so far been joined for the purposes of discovery.¹¹⁹ One class of plaintiffs is represented by former South Carolina House of Representatives member Bakari Sellers, who has independently called for a statewide investigation into the Denmark Water Crisis.¹²⁰ In response to the class action suits, Denmark has continued to minimize the overall scope of the crisis, haphazardly alleging that the eligible class of plaintiffs—that is, those who suffered harm—does not include all people in Denmark who drank Denmark water.¹²¹

Though the ongoing actions appear stalled in settlement talks, an alarming fact remains: two small class action suits are the only legally significant responses to a large-scale public health event.¹²² Ironically, the City of Denmark has in fact recently responded to ongoing community concerns regarding the quality of Denmark’s water supply: by hiring

¹¹⁷ BUREAU OF WATER, S.C. DEP’T OF HEALTH & ENV’T CONTROL, *supra* note 41, at 5.

¹¹⁸ Ganim, *supra* note 28; Zaleski, *supra* note 111.

¹¹⁹ See Complaint at 1, James v. City of Denmark, No.2018-CP0500242 (2nd Cir. C.P. filed Nov. 15, 2018); Consent Order to Consolidate Cases at 2, James v. City of Denmark, Berry v. City of Denmark, No. 2018-CP0500242, 2018-CP0500244 (2nd Cir. C.P. filed May 15, 2019); Ganim, *supra* note 28.

¹²⁰ Dionne Gleaton, *Lawmaker wants special committee to probe DHEC role of non-EPA approved chemical in Denmark’s drinking water*, THE TIMES & DEMOCRAT (Jul. 17, 2018), https://thetandd.com/news/local/government-and-politics/lawmaker-wants-special-committee-to-probe-dhec-role-in-use/article_80f65bed-2385-5948-a25c-7f07045db066.html [<https://perma.cc/LP9Q-LJVQ>].

¹²¹ Def. Mot. to Reconsider Class Certification at 2–3, James v. City of Denmark, No.2018-CP0500242 (2nd Cir. C.P. filed May 31, 2019).

¹²² See James v. City of Denmark, No.2018-CP0500242 (2nd Cir. C.P. ADR Action Jun. 6, 2019).

a public relations firm.¹²³ Continuing a pattern of Denmark leaders attempting to plead ignorance despite clear evidence of HaloSan use, Denmark city administrator Heyward Robinson suggested that the firm's services were necessary because "this small group of people have done a lot of damage to Denmark's reputation."¹²⁴

While Denmark leaders apparently struggle with the city's abstract "reputation," its citizens continue to grapple with the very real problem of not trusting their drinking water.¹²⁵ Notably, in larger, more politically connected cities like Flint, Michigan, water issues have been met with sweeping declarations of emergency.¹²⁶ In Flint specifically, a countywide declaration of emergency was declared almost immediately after community complaints and subsequent testing completed by Dr. Marc Edwards revealed profound water toxicity.¹²⁷ Quite differently in South Carolina, the long-held concerns of Denmark residents were met with silent apathy if not outright resentment.

Moreover, unlike in Flint and more visible locales, the community and legal response to water issues in Denmark has been handicapped by an absence of effective legal organizing frameworks and enforcement mechanisms. Though citizens in Denmark have made a valiant effort toward self-organization through groups like Denmark Citizens for Safe Water ("DCSW"),¹²⁸ a lack of overarching organizational support has left the community solely dependent on the volatile platform of a Facebook group page.¹²⁹ Considering the profoundly limited scope of community involvement and legal responses, the Denmark Water Crisis is cause for both a new look at reforming the SDWA and a re-evaluation of the practice of community lawyering within the context of rural, low-income communities.

¹²³ Stephen Hobbs, *A Year After a Controversial Chemical Discovery This SC City's Water Still Breeds Mistrust*, POST & COURIER (Aug. 24, 2019), https://www.postandcourier.com/news/a-year-after-controversial-chemical-discovery-this-sc-city-s/article_3dfcfc6-beaf-11e9-82e3-cb4e6b3aebc2.html [<https://perma.cc/E63R-KMG2>].

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ P.Z. Ruckart et al., *The Flint Water Crisis: A Coordinated Public Health Emergency Response and Initiative*, 25 J. PUB. HEALTH MGMT. PRACT. 1, 2–3 (Supp. 1 2019).

¹²⁷ *Id.*

¹²⁸ Ron Baxley Jr., *Denmark Citizens for Safe Water to Hold Rally, March in City on Jan. 26*, THE TIMES & DEMOCRAT (Jan. 18, 2019), https://thetandd.com/news/local/denmark-citizens-for-safe-water-to-hold-rally-march-in/article_ca2379c8-9ca6-5081-89a5-9c14233a809f.html [<https://perma.cc/6M7A-J33Z>].

¹²⁹ Den. Citizens for Safe Water, *About*, FACEBOOK, <https://www.facebook.com/groups/DenmarkCitizensforSafeWater/about/> [<https://perma.cc/DQV9-FDEG>].

IV. REFORMING THE SDWA AND THE CALL FOR ENVIRONMENTAL JUSTICE THROUGH COMMUNITY LAWYERING

A. *Denmark and Reforming the SDWA*

The ongoing crisis in Denmark is just one example of how the nearly fifty-year-old set of regulations that make up the SDWA is failing to address a distinctly low income and rural set of realities.¹³⁰ While the SDWA's widely adopted state primacy provision may have been initially conceived as a harmless and perhaps even cost-effective way of delegating enforcement responsibility,¹³¹ the well-documented failures of South Carolina's DHEC and Denmark city officials certainly call the overall efficacy of the provision into question.¹³² Even further, despite the clear command for states to report violations and inform CWS customers,¹³³ Denmark's continued HaloSan use (despite FDA warnings)¹³⁴ is an unfortunate example of a national trend of serious violations within CWSs.¹³⁵ Finally, while Denmark has been issued consent orders,¹³⁶ and the State of South Carolina has faced fines related to Denmark's water, it would be absurd to assert that these "penalties" under the current SDWA have truly ensured access to clean water by Denmark citizens.¹³⁷

Notably, a compelling case for reforming the SDWA has already been well-established—even outside the context of solely rural areas. In the wake of the Flint Water Crisis, for example, experts have specifically pointed out how the shortcomings of the SDWA's current reporting and notice structure "allow[ed] officials to shirk their responsibilities" in addressing Flint's severe water problems.¹³⁸ As in Denmark, people in Flint were not informed of lead contamination in their water supply until well after many city administrators were aware of the issue—leading to a broad call for "revised timelines regarding notice to the public" under the SDWA.¹³⁹ Finally, in yet another unfortunate parallel to Denmark, lax reporting and enforcement ambiguity under the SDWA allowed Flint

¹³⁰ EPA, *supra* note 66.

¹³¹ 42 U.S.C. § 300g-2 (2018); EPA, *supra* note 66.

¹³² *See supra* Sections I.B and III.A.

¹³³ *See supra* Section II.A.2.

¹³⁴ *See supra* Section I.C.

¹³⁵ Fortin, *supra* note 88.

¹³⁶ *See supra* Section I.B; *supra* Section III.A.

¹³⁷ *Id.*

¹³⁸ Sherwin, *supra* note 3, at 695.

¹³⁹ *Id.* at 669.

officials to ignore and deny grave drinking water deficiencies even in the face of pressure from Flint citizens and the scientific community.¹⁴⁰ However, despite analogous SDWA problems in Flint and Denmark, only the Flint water crisis has led to a bare modicum of significant regulatory repair—with proposed legislation to improve lead-contamination notification.¹⁴¹ Seemingly, Denmark and other rural places grappling with clean drinking water access are too unknown and perhaps too complicated to garner the attention of reformers.

For places like small-town Denmark, the challenge of regulatory problems and inadequate enforcement provisions under the current SDWA is a uniquely threefold one. First, the SDWA's current state primacy provision is simply inadequate to provide proper enforcement and monitoring for cash-strapped, rural places. Second, once water problems arise, the current SDWA does not sufficiently incentivize CWS administrators in these communities to report and inform communities of violations. Third, and most critically, the SDWA is currently without guaranteed remedial measures that are tailored to the needs of rural, imperiled communities. A move to reform the SDWA should seek to simultaneously address these three concerns.

1. Alterations to the State Primacy Provision

First, in addressing the existing enforcement maze within the SDWA, cities like Denmark and states like South Carolina would benefit from an alternative conception of the state primacy provision. Currently, as commentators have pointed out, the existing state primacy framework presupposes “cooperative federalism” between federal, state, and local actors.¹⁴² However, as the disconnect between the EPA and Denmark regarding Halohydanatoins¹⁴³ alone indicates, this idealized level of enforcement and monitoring collaboration has proven nonexistent in practice, both in Denmark and nationwide.¹⁴⁴

Instead, Congress should consider a new, more flexible conception of the primacy provision—one rooted in already proposed changes and one which recognizes the severe challenges to small towns in securing effective oversight over their CWSs. This Note advocates an approach

¹⁴⁰ *Id.* at 696.

¹⁴¹ *Id.*

¹⁴² *Id.* at 711.

¹⁴³ *See supra* Section I.C.

¹⁴⁴ *Id.*; *see also supra* Section II.A.2; *supra* Section I.B.

inspired by a proposal put forward by environmental health expert David Dana: assigning all responsibility and ongoing management to state agencies exclusively, rather than allowing individual municipalities to supervise their respective CWS.¹⁴⁵ In practice, this would involve states taking on the duties of testing drinking water, completing required treatment procedures, and informing citizens when problems within the CWS arise.¹⁴⁶ As Dana has pointed out, simplifying state primacy by restricting it to states, rather than municipalities, could have a beneficial, secondary effect: there may be an increased awareness of drinking water issues on the part of newly involved state-level politicians.¹⁴⁷

Departing from the approach advocated by Dana, however, a more moderate change to the SDWA may be more appropriate, albeit one still informed by a recognition of the need for increased state control. Instead of default state oversight, which Dana concedes may cause some state legislatures “to flinch” in response to such a “radical option,” states should, under a reformed SDWA, only have automatic oversight over CWS administration for municipalities which fall under a predetermined population threshold.¹⁴⁸

Under this regime, a small community like Denmark would indeed automatically have its CWS wholly administered by the State of South Carolina. Such a change could alone eliminate the well-documented training and staffing problems experienced by small municipalities like Denmark.¹⁴⁹ SDWA fees would largely be unnecessary and thus the confusion regarding their impact on responsibility could be alleviated. Moreover, this scheme would replace current enforcement confusion with “a defined system, requiring action and accountability by specific [state] agencies.”¹⁵⁰ A more well “defined system” overseen by a larger entity (i.e., a state) may prevent a dangerous chemical like HaloSan from ever being introduced into a CWS merely because a small-town CWS administrator “think[s]” it is approved.¹⁵¹

This path of reform is also appealing on a pragmatic level. Including a mandate within the SDWA that state-level agencies have increased and, in the case of small communities, exclusive control over CWSs would

¹⁴⁵ See David Dana, *Escaping the Abdication Trap When Cooperative Federalism Fails: Legal Reform After Flint*, 44 *FORDHAM URB. L.J.* 1329, 1350 (2017).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1351.

¹⁴⁸ *Id.* at 1350.

¹⁴⁹ Allaire et al., *supra* note 1, at 2082; see S.C. DEP’T OF HEALTH & ENV’T CONTROL, *supra* note 34, at 6.

¹⁵⁰ Sherwin, *supra* note 3, at 711.

¹⁵¹ Ganim, *supra* note 28.

help to alleviate a more basic issue faced by rural places: money.¹⁵² Critically, Denmark fits into a nationwide pattern of rural, low-income communities struggling with regulatory compliance due to “limited financial resources and technical expertise.”¹⁵³

The resource gap for places like Denmark is staggering and has a profound effect on the ability of similar communities to adhere to the commands of the SDWA. For example, a report from the Government Office of Accountability found that training, funding, and staffing issues—each directly linked to financial status—are the three primary contributors to inadequate compliance under the SDWA.¹⁵⁴ Under a system that placed the burdens of paying employees, coordinating training programs, and generally providing for the continued management of a CWS on the State of South Carolina rather than on a low-income community of 3,500, the people of Denmark would have their drinking water protected by an entity that can actually afford to protect it.¹⁵⁵

2. Information for All

Apart from the inherent issues presented by the SDWA's existing state-primacy provision, an even more basic failing has continued to be at issue in both Denmark and elsewhere: information access. In Denmark, it was precisely a level of terrifying confusion surrounding the safety of the town's water supply that resulted in an anxiety that lingers into the present.¹⁵⁶ The inaccessibility of information and lack of meaningful public notice mechanisms has also been highlighted as a broader failure of the current SDWA nationwide, including in Flint.¹⁵⁷ Though in South Carolina the DHEC has created a centralized website which documents Denmark's water quality, the information is almost totally backward looking, relating primarily to events from 2011 to 2017.¹⁵⁸ Thus, this attempt at providing notice fails to address the most basic drinking water question of all: is the water safe to drink today?

¹⁵² Allaire et al., *supra* note 1, at 2082.

¹⁵³ *Id.*

¹⁵⁴ U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-381, *Drinking Water: Unreliable State Data Limit EPA's Ability to Target Enforcement Priorities and Communicate Water Systems Performance*, 20 (2011).

¹⁵⁵ U.S. CENSUS BUREAU, *supra* note 13.

¹⁵⁶ See Ganim, *supra* note 28; Hobbs, *supra* note 123.

¹⁵⁷ Sherwin, *supra* note 3, at 711.

¹⁵⁸ See *Denmark Public Water System*, S.C. DEP'T OF HEALTH & ENV'T CONTROL, <https://www.scdhec.gov/environment/your-water-coast/denmark-public-water-system> [<https://perma.cc/B697-4RV4>] (last visited Mar. 10, 2021) (website landing page contains downloadable fact sheets and archival records).

An amendment to the SDWA could easily address this shortcoming—namely one that takes into the account the view that a properly informed public “should be a fundamental consideration” when governments are responding to concerns about water quality.¹⁵⁹ In practice, such an amendment would require states operating under the SDWA’s state primacy provision to develop an easy to use, centralized web platform to display water quality data. Ideally, data would be updated daily—a requirement that may itself lead to improved drinking water quality as states would be forced to become even more vigilant through the requisite technology that would make such monitoring possible. Of course, as a practical consideration, this amendment would need to take into consideration the alarming fact that nearly a quarter of rural Americans report significant barriers to internet access.¹⁶⁰ To address this concern, any such amendment should include language requiring duplicate information presented on a toll-free telephone line.

The style of this updated and accurate water-quality web platform could borrow from an approach used to simplify another complicated area of federal regulation: the tax code. Surprisingly, the current Internal Revenue Service website is easy to navigate, offering topic area tabs, downloadable forms, and informational videos.¹⁶¹ As one tax law expert has pointed out, IRS materials, including its web services, are specifically designed to accomplish the difficult goal of accurately displaying tax law in an “understandable and easy-to-read manner.”¹⁶² Moreover, it is specifically the web-component of IRS information and its subsequent search-ability which has allowed “large numbers of stakeholders” to receive necessary tax information.¹⁶³ It is more than a little remarkable that accessing information about the tax code may be easier than discovering whether your child’s bathwater is contaminated. An SDWA web platform that is tailored to individual communities and one which uses the most up-to-date data possible could help close this gap.

¹⁵⁹ Sherwin, *supra* note 3, at 696.

¹⁶⁰ Monica Anderson, *About a Quarter of Rural Americans Say Access to High-Speed Internet Is a Major Problem*, PEW RSCH. CTR.: FACT TANK (Sept. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/09/10/about-a-quarter-of-rural-americans-say-access-to-high-speed-internet-is-a-major-problem/> [https://perma.cc/EPX9-76BJ].

¹⁶¹ See U.S. INTERNAL REVENUE SERV., <https://www.irs.gov/> [https://perma.cc/TJ2P-S72M] (last visited Mar. 10, 2021) (IRS home page features several menus and links).

¹⁶² Andrea Monroe, *Hidden in Plain Sight: IRS Publications and a New Path to Tax Reform*, 21 FLA. TAX REV. 81, 92 (2017).

¹⁶³ *Id.* at 84.

While an SDWA amendment requiring increased access and more granular data would undoubtedly improve confidence in water quality in places like Denmark, it may also help address two secondary concerns: internal confusion and reporting. In Denmark, for example, city leaders repeatedly denied the existence of problems with the city's water because the bird's-eye, yearly reports from the DHEC suggested the system was operating normally.¹⁶⁴ Unfortunately, blind adherence to data, regardless of its accuracy or expiration date, was also seen in Flint, with "county officials blaming the City of Flint for not providing them with information" that accurately represented the current conditions of the water system.¹⁶⁵ In contrast, a constantly running, constantly updated web or phone-line platform would offer irrefutable evidence of an ongoing problem.

In addition, if the baseline amount of water quality information was made more accessible and the SDWA's state primacy provision was shifted to place a lesser burden on small communities, the glorified "honor code" of violation reporting may disappear.¹⁶⁶ In short, because states, rather than local municipalities, would be tasked with SDWA compliance and reporting, places like Denmark would no longer be forced to weigh their duty to report against their inability to pay the penalty.¹⁶⁷

3. Mandated Emergency Measures

Finally, the overall experience of Denmark citizens in confronting issues with their drinking water is cause for a radical re-evaluation of how the SDWA handles large-scale water crises. Shockingly, even after Denmark's use of HaloSan was revealed and water problems continued to persist, city residents received little in the way of government assistance.¹⁶⁸ Instead, the people of Denmark were forced to turn to charity drives at baseball stadiums,¹⁶⁹ donations from self-organized community groups,¹⁷⁰ and perhaps most incredibly, a bulk bottled water donation from 2020 presidential candidate Bernie Sanders.¹⁷¹ Effectively, despite

¹⁶⁴ Ganim, *supra* note 28.

¹⁶⁵ Sherwin, *supra* note 3, at 663.

¹⁶⁶ FEDINICK ET AL., *supra* note 90, at 7.

¹⁶⁷ See *supra* Section II.A.2.

¹⁶⁸ Zaleski, *supra* note 111.

¹⁶⁹ Sammy Fretwell, *Denmark's water woes spark charity drive at Columbia ballpark*, CHARLOTTE OBSERVER (Feb. 4, 2019), <https://www.charlotteobserver.com/news/state/south-carolina/article225498560.html> [<https://perma.cc/6N4Y-K7SL>].

¹⁷⁰ Hobbs, *supra* note 123.

¹⁷¹ Bradley Harris, *Sanders campaign donating water, rally planned in Denmark*, THE

the laudable promises of the SDWA, people in Denmark were left to fend for themselves.

The lack of federal or state response is both troubling and ultimately unsurprising given the web of confusion presented by the SDWA's current state primacy structure.¹⁷² However, the lack of concrete assistance highlights the third and perhaps most basic unanswered question under the current SDWA: what really happens when things go wrong? While the SDWA currently mandates penalties for various violations, it does little in the way of providing an established path for states and municipalities to address the needs of those whom the SDWA was most intended to protect, people and families that rely on clean drinking water.¹⁷³ Into this void, formally adopting the language and approach of two distinct responses to drinking water issues may offer a useful path forward.

First, in the wake of drinking water issues in Michigan, advocates have pursued constitutional claims, arguing that violations of the SDWA that result in the unknowing ingestion of tainted water represent a violation of subsequent due process and equal protection.¹⁷⁴ Second, in response to the nationwide problem of drinking water safety, advocates have pushed for the passage of legislation that would grant specific communities guaranteed financial and infrastructure reparations after an environmental crisis occurs.¹⁷⁵

In *Boler v. Earley*, a recent challenge arising out of the Flint Water crisis, plaintiffs alleged (among other claims) that the violations of the SDWA which occurred in Flint (1) violated Substantive Due Process through both state created danger and an invasion of the right to bodily integrity and (2) violated the Equal Protection Clause through wealth-based discrimination.¹⁷⁶ To the surprise of many, the Sixth Circuit was not entirely dismissive of these claims, making a threshold finding that they were not precluded by the SDWA itself.¹⁷⁷ While its final dispensation is uncertain, *Boler* has broadly demonstrated that Due Process and

TIMES & DEMOCRAT (May 23, 2019), https://thetandd.com/news/local/sanders-campaign-donating-water-rally-planned-in-denmark/article_cf024317-4756-5ef2-8e5d-74125eac110b.html [<https://perma.cc/AQ39-S4M7>].

¹⁷² See *supra* Section II.A.2.

¹⁷³ See, e.g., 42 U.S.C. § 300g-2(a)(7) (2018); *id.* § 300g-2(a)(7)(A); *id.* § 300g-2(a)(7)(B).

¹⁷⁴ See, e.g., Erin Mette, *A Constitutional Right to Safe, Affordable, Accessible Drinking Water*, 32 TUL. ENV'T L.J. 189 (2019).

¹⁷⁵ See, e.g., Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U.L. REV. 1327 (2016).

¹⁷⁶ *Boler v. Earley*, 865 F.3d 391, 399 (6th Cir. 2017).

¹⁷⁷ Mette, *supra* note 174, at 194.

Equal Protection language may offer “a legal foothold” for improving the framework of the SDWA.¹⁷⁸

Apart from constitutional claims, advocates have also forwarded a notion of community reparations in response to violations of environmental laws. One suggested model involves a reparation scheme that includes a consideration of community health and infrastructure needs.¹⁷⁹ Under this framework, communities that have experienced some form of environmental trauma would be given “health-related assistance” to address “exposure and latent effects.”¹⁸⁰ In addition, advocates of this framework have called for the issuance of “community-based funds” that would go toward improving the resilience of communities that may be currently without “adequate environmental testing.”¹⁸¹

An amendment to the SDWA that codified these two initiatives into the text of the Act would significantly improve the adherence of the SDWA to its guiding goal: securing America’s health by “regulating the nation’s public drinking supply.”¹⁸² First, amending the SDWA to include language related to bodily integrity, state created danger, and income-related issues would have a profound symbolic effect, reminding all confronting the Act of its connection to basic human survival. Moreover, once drinking water crises do arise, the inclusion of this or similar affirmative, rights-based language with the SDWA could help to bolster claims put forth by communities like Denmark as they seek to challenge the failures of CWS administrators in court.

Secondly, amending the SDWA to include a firmly prescribed pathway of community assistance—rather than just penalties assessed on administrators—would both closely adhere to the goals of the SDWA and more broadly ensure that all Americans are guaranteed drinking water that is not only safe, but worry free. Under such an amendment, the people of Denmark would likely not have had to resort to the unbelievable remedy of self-help when their trusted leaders repeatedly failed to adhere to the SDWA’s commands. Instead, an SDWA that included a provision for “community-based reparation” would offer places like Denmark a comprehensive plan to address both health and infrastructure concerns once SDWA violations occur.¹⁸³

¹⁷⁸ *Id.* at 203.

¹⁷⁹ Kaiman, *supra* note 175, at 1370.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² EPA, *supra* note 66.

¹⁸³ Kaiman, *supra* note 175, at 1370.

B. Community Lawyering, Environmental Justice, and Denmark

Obtaining improved access to clean water for low-income, rural communities—much less amending the SDWA—will require significant changes in the positioning of legal advocates, both in the courtroom and the community. Currently, as the seemingly endless situation in Denmark shows, there does not appear to be a broad consensus about the most effective way for communities to obtain better environmental outcomes or what the most effective organizational tools are for lawyers and communities in need.

Despite the size and scope of the Denmark Water Crisis, there have been only two state-level legal actions.¹⁸⁴ Additionally, as 2020 progresses, a unified, empowered movement has yet to emerge from the Denmark community.¹⁸⁵ The solution to the current stalemate may lie in a twofold approach: (1) a renewed attention to environmental justice and (2) a brand of specifically rural, low-income community lawyering.

1. Environmental Justice in Denmark and Beyond

At its core, environmental justice refers to the consideration of “disproportionate environmental impacts on communities of color [and] low-income communities.”¹⁸⁶ In practice, environmental justice also encompasses a holistic advocacy philosophy and orientation—as lawyers within the movement seek to assist communities to overcome barriers related to race, class, or other sources of discrimination.¹⁸⁷ The work of Earthjustice, a nonprofit legal organization focused on environmental issues, offers a useful example of environmental justice in practice.¹⁸⁸ In a rural, low-income area of Louisiana known as “Cancer Alley” due to the prevalence of cancer and a surrounding landscape of petrochemical plants, lawyers from Earthjustice worked to turn anger into action.¹⁸⁹ There,

¹⁸⁴ See Complaint, *James v. City of Denmark*, No.2018-CP0500242 (2nd Cir. C.P. filed Nov. 15, 2018); Consent Order to Consolidate Cases, *James v. City of Denmark*, *Berry v. City of Denmark*, No. 2018-CP0500242, 2018-CP0500244 (2nd Cir. C.P. filed May 15, 2019).

¹⁸⁵ See *supra* Section III.B; Denmark Citizens for Safe Water, *supra* note 129.

¹⁸⁶ Alan Ramo, *Environmental Justice as An Essential Tool In Environmental Review Statutes: A New Look At Federal Policies and Civil Rights Protections And California's Recent Initiatives*, HASTINGS W.N.W. J. ENV'T L. & POL'Y 41, 42 (2013).

¹⁸⁷ *Id.* at 42.

¹⁸⁸ *About Us*, EARTHJUSTICE, <https://earthjustice.org/about> [<https://perma.cc/W4Q4-QKQ6>] (last visited Mar. 10, 2021).

¹⁸⁹ Emilie K. Surrusco, *Cancer Alley Rises Up*, EARTHJUSTICE (Feb. 14, 2020), <https://earthjustice.org/features/cancer-alley-rises-up> [<https://perma.cc/WS86-9Z4B>].

lawyers and advocates chose to interpret community's struggle not as an isolated example of tort harm, but instead as part of a larger, "pernicious threat to the health" of a community that is inseparable from its demographic makeup.¹⁹⁰

Applied to Denmark, lawyers and advocates could similarly use the principles of environmental justice to do more than just challenge the actions of the DHEC and Denmark CWS administrators in court. Rather, practitioners could take part in a dialogue with Denmark city leaders, DHEC administrators, and South Carolina politicians that considers Denmark's unique demographic quality.¹⁹¹ Much like communities within "Cancer Alley," it is precisely Denmark's status as a low-income community that has resulted in placing its CWS in a perilous position.¹⁹² Of course, to effectuate this underlying goal of environmental justice, advocates must consider their relationship to the community at large.

2. Community Lawyering

In Denmark and in rural places nationwide, making meaningful inroads towards either securing SDWA reform or broader environmental justice will be impossible without an improved community network. Indeed, providing a platform for impactful community organizing is the mission of what has become known as community lawyering. Community lawyering posits that the role of the lawyer is "expansive" and is reliant on an intimate knowledge of the community and is grounded in a cohesive "theory of action."¹⁹³ It is the theoretical component that positions effective community lawyers as advocates for improving the both the "physical and social environment" of the community.¹⁹⁴

To be effective within the movement of environmental justice, community lawyering also involves a careful consideration of the power dynamic between lawyer and community. Proponents of the community lawyering approach have noted that an impactful relationship requires the awareness that "affected communities do actually know what is best."¹⁹⁵

¹⁹⁰ *Id.*

¹⁹¹ U.S. CENSUS BUREAU, *supra* note 13.

¹⁹² *See supra* Section II.A.

¹⁹³ Michael Diamond, *Community Lawyering: Introductory Thoughts on Theory and Practice*, 22 GEO. J. POVERTY. L. & POL'Y 392, 396 (2015).

¹⁹⁴ *Id.* at 397.

¹⁹⁵ Marika Dias, *Stepping Aside, Standing Back, and Raising Up: Lawyering within Grassroots Community Movements*, 22 GEO. J. POVERTY. L. & POL'Y. 405, 413 (2015).

Thus, rather than operate from outside the community, community lawyers should consciously seek to avoid reinforcing an imbalanced power dynamic.¹⁹⁶ For lawyers seeking to assist rural communities, this concern is particularly important. Given rural America's current lawyer shortage, there may be an inherent level of unfamiliarity between the legal community and the "distinctly vulnerable population" within rural communities.¹⁹⁷ Because rural communities suffer disproportionately from the symptoms of injustice and a lack of access to advocacy,¹⁹⁸ rural community lawyering demands that lawyers operate with a specifically rural cultural competency.¹⁹⁹ In short, rural community lawyers must meet communities where they are.

Applied to Denmark and the rural fight for clean drinking water nationwide, effective community lawyering would utilize the field's best practices to develop broad community movements. Community lawyers could assist in communities like Denmark—much like Earthjustice lawyers in Cancer Alley—to transmute righteous community anger into activism.²⁰⁰ In Denmark, for example, this approach would call for lawyers to hold information sessions to discuss the health risks of HaloSan; engage directly with Denmark city leaders at town meetings; and most importantly, be responsive to Denmark residents. Whereas the Denmark Water Crises has thus far only generated a blip of advocacy,²⁰¹ rurally oriented community lawyering could be the first step to forming a "critical consciousness" around the environment, community health, and the SDWA.²⁰²

CONCLUSION

The purpose of the SDWA is admirably simple: to protect public health.²⁰³ With the arrival of 2020, however, it will soon be two years since initial closure of Denmark's Cox Mill well and the subsequent discovery that Denmark's residents were not included with the SDWA's promise. Since then, further failures of enforcement and emergency management

¹⁹⁶ *Id.*

¹⁹⁷ Lisa Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 19 (2018).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 22.

²⁰⁰ Surrusco, *supra* note 189.

²⁰¹ *See supra* Section III.B.

²⁰² Aaron Samsel, *Toward a Synthesis: Law as Organizing*, 18 CUNY L. REV. 375, 395 (2015).

²⁰³ EPA, *supra* note 66.

on the part of officials has the exposed the dysfunction built into the nation's regulation of drinking water. While the SDWA remains a laudable example of public-positive federal legislation, the Denmark Water Crisis demonstrates the need for changes that tackle the unique challenges facing low-income, rural America in the fight for clean drinking water.

Without the courageous response of Denmark residents, the scope of Denmark's HaloSan use and the city's level of mismanagement would have remained concealed. Still, the feeble response of government officials and the relative silence of the SDWA has left Denmark's residents without viable options for securing drinking water that is free from anxiety. Instead, ensuring adequate enforcement, preventing future violations, and broadly amending the SDWA will require a cohesive movement, one built on community engagement. Therefore, the crisis in Denmark and other, similar drinking water problems in rural America present lawyers with a unique opportunity to pair the goals of environmental justice with the tools of community lawyering. Under this approach, people in Denmark and other rural communities can rely on—rather than fear—water from a trusted source: their taps.