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A Clear Commitment to America's Waters

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May 15, 2017

Sarah Rees
Director, Office of Regulatory Policy and Management
Office of Policy
1200 Pennsylvania Ave, NW MC 1803A
Washington, D.C. 20460
Via *Regulations.gov*

RE: Docket ID EPA-HQ-OA-2017-0190 – Evaluation of Existing Regulations

Dear Ms. Rees,

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on Docket ID EPA-HQ-OA-2017-0190, a request for comment on the evaluation of existing EPA regulations (82 Fed. Reg 17793; April 13, 2017). NACWA represents the interests of the nation's public wastewater treatment utilities or clean water agencies.

NACWA's utility members are the front-line public stewards safeguarding the nation's water quality, so it is critical to understand that the goal of the Association's engagement in this public comment process is not to pursue regulatory rollbacks or weakening of the Clean Water Act (CWA). Such actions would be counter to NACWA's goals and objectives as an organization. Instead, NACWA's focus is on identifying those areas that may help clean water utilities meet their environmental and public health responsibilities in a more effective and efficient manner.

Recent momentum among clean water utilities to embrace the concept of the Water Resources Utility of the Future (UOTF) guides NACWA's advocacy efforts with EPA and Congress. The UOTF initiative embodies the spirit of innovation and efforts to go beyond simply complying with the CWA, but it also seeks to remove hurdles to utility innovation and to ensure that utilities can most effectively serve their communities and ratepayers by ensuring the best environmental and public health return for each ratepayer dollar invested – with an overall focus on net environmental benefit outcomes. Regulatory reform is not just about removing unnecessary or duplicative regulations, it is also about making improvements to the existing rules and regulations to ensure greater consistency.

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The issues described below have been identified by NACWA members as ways to enhance their ability to provide flexible and affordable local approaches while at the same time achieving their goals to protect the environment and public health more effectively and cost-efficiently. Many of the issues raised by NACWA members have developed as EPA has interpreted the CWA and promulgated new regulations over the years. As such, there are options for resolving these through regulatory improvement and modifications. At the same time, some of these issues can also be resolved by Congress via targeted modifications to the CWA (or another environmental statute). In some cases, the issues raised by NACWA's members can only be resolved by Congress through revisions to the underlying statutory authority. We have included these areas to provide a comprehensive view of the challenges the clean water community faces and the opportunities to make improvements that could enhance the effectiveness of our operations.

Overarching Recommendations for Improvement

The Integrated Planning (IP) Framework developed by the previous administration has proven to be an important tool for clean water utilities to plan and sequence their investments in a manner that minimizes the financial impact on the local community while maximizing the environmental benefit for each dollar invested. More importantly, the IP Framework is an acknowledgement that local governments and public clean water utilities are partners with EPA and the states in achieving the goals of the CWA and need to be given more control over the prioritization and pace of their water infrastructure investments. NACWA urges EPA and Administrator Pruitt to reaffirm this commitment to work with their local partners and to look for ways to further expand this important partnership through integrated planning and in all its interactions with the public clean water community and local governments as a whole.

Nowhere is this need for greater collaboration with local partners more evident than in the Agency's approach to enforcement. For more than a decade, wet weather issues including combined sewer overflows (CSOs), sanitary sewer overflows (SSOs) and stormwater have been identified as a priority for EPA's enforcement office. This has led to more than 120 federal wet weather consent decrees imposing billions of dollars of spending to address these issues. The water quality challenges these decrees target are real and in some cases enforcement may be necessary, but EPA must begin to lead with true compliance assistance, to help communities come into compliance, instead of defaulting to an enforcement posture.

In addition to reviewing its regulations and adjusting its approach to enforcement, EPA must also examine its impact outside of the regulatory sphere. For example, EPA must acknowledge that many of the actions it takes under the CWA, though not regulatory in nature, can have very real and costly impacts on the regulated community, including clean water utilities.

An excellent example of this are EPA's water quality criteria recommendations. While EPA has previously asserted that it cannot consider cost in developing these recommendations and that they have no direct cost impacts, the recommendations, combined with EPA's implementation practices, do have significant impacts. While states have the lead on developing water quality standards based on EPA's recommendations, the federal criteria are often used by default. And where states may look to deviate from the national recommendations, EPA has often worked behind the scenes to influence state decision-making to conform with federal policy preferences. This has also happened in other situations including human health criteria and whole effluent toxicity testing. In these contexts, EPA's recommendations or guidance often become de facto regulations – without going through proper federal notice and comment procedures – that impose very real cost implications

on clean water utilities. These types of non-regulatory actions must also be subjected to review for potential reform.

Recommendations for Improving Implementation of Clean Water Requirements

Some of the recommendations discussed below may require a mix of EPA and Congressional action, but EPA can make significant improvements in current implementation without changes to the underlying statute.

1. Secure more flexibility in how affordability issues are addressed by EPA and considered at the local level, and secure integrated planning approaches as a key tool available to all clean water utilities in both the permitting and enforcement contexts. Consistent with the IP Framework, refocus EPA's efforts away from establishing enforcement priorities for the clean water community toward working with utilities to provide compliance assistance.

   Affordability and integrated planning issues continue to be a top priority for clean water utilities across the country. NACWA has focused considerable efforts and resources on these issues over the past five years and will continue to do so.

   While significant progress has been made in recent years on both integrated planning and affordability, including two EPA framework documents addressing these issues, more must be done. Most importantly, greater use of integrated planning and more accurate affordability considerations must be available to any clean water utility in any permitting or enforcement context. EPA's acceptance of these tools must not be discretionary or subject to change on a whim. NACWA is already working hard on bipartisan legislation that would enshrine integrated planning principles in the CWA, along with more appropriate and reasonable affordability considerations, and this will continue as a top Association priority regardless of any other regulatory improvement initiatives.

2. Ensure that all EPA actions that can impose new regulatory burdens on clean water utilities – such as water quality criteria, new test methods, TMDLs, and any other new requirements – be established through full and formal public notice and comment that includes cost-benefit and net environmental benefit considerations. Accomplishing this goal would involve both EPA action and changes to the CWA, which we hope EPA would support.

   There are many actions EPA takes that can impact regulated municipal utilities and have real cost implications. But not all these actions must go through the full public review process required for regulations or be examined through a net environmental benefit lens to evaluate whether the new requirement will in fact result in an improvement in water quality and not have negative impacts on other water or broader environmental areas. As discussed above, EPA publishes water quality criteria pursuant to Section 304(a) to reflect the best scientific information available. These criteria are a critical part of water quality standards. Courts have determined that EPA is not required to follow the public notice and comment requirements of the Administrative Procedure Act before publishing these criteria. TMDLs are developed pursuant to Section 303(d) of the CWA for impaired waters, and they, too, significantly affect

the establishment of effluent limits in National Pollutant Discharge Elimination System (NPDES) permits.

In consideration of the importance of the development of water quality criteria and TMDLs, and their subsequent impact on effluent limits in NPDES permits, the public should have the opportunity to provide and have relevant information – including cost-benefit and net environmental benefit analyses – considered when they are being developed. Any new test methods or procedures or other requirements that have an impact on NPDES permit compliance should also go through the same review process. Regulation via guidance or policy memos that establish additional non-discretionary requirements on permittees should also be subjected to full notice and comment review.

3. Modify the existing approach to wet weather permitting, consistent with the IP Framework, to ensure clean water utilities can fully evaluate and consider the best expenditure of their resources. Establish reasonable guidelines for SSO design standards to allow for a rational, permit-based approach to addressing SSOs.

   EPA's interpretation of the CSO policy and stormwater regulations and its enforcement-driven approach to implementation have cost utilities millions of dollars in legal fees and billions of dollars for expensive upgrades for treatment and storage facilities that may be used only occasionally during periods of peak wet weather flows. The integrated planning and related affordability frameworks are helping to give utilities more control over the sequencing of these expenditures to prioritize those investments that result in the greatest environmental benefit, but more must be done to recognize that some of these investments may not result in dramatic or even measurable improvements in water quality or human health protection.

   The lack of clarity concerning the definition and appropriate regulation of SSOs has resulted in inconsistent standards and enforcement. In some instances, SSOs have been considered violations of NPDES permits under the "proper maintenance" requirements, regardless of whether they discharge to a water of the U.S. The lack of a reasonable design standard or criteria to address SSOs and "hybrid" systems (systems intended to perform as two-pipe combined systems, but not currently covered by the CSO Control Policy) has resulted in substantial expenditures by utilities, without necessarily obtaining commensurate measurable water quality improvements. Utilities should be afforded a "safe harbor" so that they are not penalized for events beyond their control, potentially through the use of a design standard or through changes in current permitting approaches. Consideration should also be given to the water quality impacts or lack thereof of SSOs when evaluating whether they are a violation of the CWA.

4. Establish a consistent policy on blending by applying the 8th Circuit Decision nationwide to ensure the federal requirements applicable to clean water utilities are clear and uniform regardless of where they may be located.

EPA's current position that peak wet-weather management techniques such as blending constitute a bypass is not consistent with the CWA and ignores long-established, sound engineering practices aimed at maximizing the amount of wastewater that is treated during wet weather while maintaining water quality in receiving waters at the highest levels practicable.

5. Encourage greater use of wet weather water quality standards instead of applying dry-weather criteria in extreme weather situations.

   While states currently have this authority, wet weather water quality standards are rarely used or face fierce opposition from environmental groups. These temporary, time-limited standards can provide important relief for utilities while maintaining water quality protections during the bulk of the year. Rather than applying a water quality standard that was designed to protect human health and/or aquatic life at times of low flow during extreme rain events, wet weather water quality standards recognize that attempting to meet those more stringent standards is a waste of limited resources. EPA should find ways to encourage and incentivize states to take advantage of this existing flexibility in the CWA.

6. Revise the WQS regulations and/or issue a policy statement to provide greater support for watershed-based solutions, including regional watershed initiatives, watershed permits and water quality trading.

   EPA and some states have recognized the value of watershed-based solutions, including the need to consider watershed based permits, to account for upstream and downstream impacts. Some efforts at watershed based permits have been successfully implemented, but the administrative complexities and legal constraints have not facilitated this process. Similarly, EPA has sought to promote trading by issuing guidance, but like watershed-based permitting, some view existing CWA language as impeding a full use of this approach. Watershed based solutions, including permits and trading, can be particularly useful to address nutrient concerns and should be a regular consideration in the permitting process.

7. Allow for NPDES permit terms to extend beyond five years if a permittee so desires to allow for greater certainty and long-term investment planning. Where longer permit terms are not available, increase the use/availability of compliance schedules to provide utilities with more time to achieve water quality standards. Where permits cannot be issued for more than five years, consider automatic renewal if no significant changes have occurred necessitating different permit limits.

   The five-year permit term established by the CWA was appropriate 45 years ago as part of a new national water discharge permitting program when no one knew with certainty whether or how that program would succeed. It is well-settled that the NPDES permitting program has been a great success in improving water quality throughout the country. Its substantive and procedural requirements are generally well-established and well-understood in the regulated community.

   For mature utilities that have been subject to NPDES permits for decades, a five-year permit term can impede the utility's ability to plan, develop and implement successful long-term strategies necessary to make rational technical and financial decisions to meet the requirements

of the CWA. The environmental value, if any, of requiring such utilities to prepare permit applications and complete the permitting process every five years does not justify the time and expense necessary. Moreover, NPDES permits can always be modified if new information or conditions arise that would justify mid-term changes to protect the environment.

States and EPA should be allowed to issue NPDES permits longer than five years, if requested, to a municipal permittee during the permit application process. In addition, and especially where permit terms remain at five years, the use of compliance schedules over multiple permit terms to achieve water quality standards should be clarified, expanded, and encouraged. Alternatively, if there have been no significant changes in the receiving water body, state regulations, or the nature of the discharge, there should be an option for automatic permit renewals every five years.

8. Revise water quality standards regulations to allow for increased use of existing CWA tools (e.g., use attainability analyses) and provide more flexibility for states to address designated uses and criteria for certain parameters (including pathogens and nutrients) and other matters that warrant greater local/site-specific consideration (e.g., urban watersheds where a fishable/swimmable goal may not be achievable at all times or alternative approaches to numeric nutrient criteria).

   Ensure states are allowed to take the lead on policy decisions regarding water quality standards and NPDES permit requirements and reduce attempts by EPA to influence state decision-making processes to ensure state standards conform to federal policy preferences.

   The 1972 CWA provided relatively little guidance to EPA concerning the development of water quality standards. Section 303(c)(2)(A) provided that when a state adopts or revises a water quality standard, the standard is to consist of the designated uses and the water quality criteria for the waters, based upon those uses. The standards are to protect public health or welfare, enhance water quality, and serve the purposes of the Act, and are to be established taking into consideration their use and value for various designated uses.

   EPA has, over the years, promulgated detailed regulations for states to follow when adopting water quality standards, and the procedures by which the states must incorporate those standards into individual NPDES permits. The CWA allows EPA to determine "whether the standard meets the requirements" of the CWA, and if not, allows EPA to promulgate the standard in lieu of the state.

   In promulgating its regulations, EPA has significantly restricted the ability of the states to make their own determinations with regard to water quality standards, especially around issues that are site-specific and could benefit from more innovative, local solutions. For example, current regulations contain a rebuttable presumption that all states' waters would be designated fishable and swimmable unless the state submitted documentation justifying why those waters would be designated for any other uses. 40 CFR 131.10. While such a presumption is an important aspirational goal, there is increasing concern from many stakeholders that it is not realistic for many current urban watersheds and that a different target is appropriate. But

current regulations allow changes in designated uses only upon a showing of widespread social and economic costs, among other things.

By regulation, EPA decided that "existing uses" must be uses or potentially achievable uses as of November 28, 1975. EPA has regulated that effluent limitations in permits generally be based on 7Q10 (low flow conditions) instead of typical or average flows, and is seeking to prevent states from allowing mixing zones in certain areas. These are a just a few of the regulatory requirements that EPA has promulgated that do not give states flexibility to make decisions based on their local knowledge and site-specific conditions, including conditions that occur during wet weather events.

When the CWA was enacted in 1972, States had varying degrees of technical expertise and political will to develop and implement water quality permitting measures. The CWA authorized EPA to develop water quality criteria and programs, and to authorize states that demonstrated the legal, technical and financial capability to administer those programs to do the same. EPA also was given the authority to approve or disapprove states' water quality standards, TMDLs and NPDES permits to provide national consistency, technical assistance and oversight to states as they began to develop their own programs.

In the intervening 45 years, states have developed considerable expertise and have shouldered the load in developing water quality standards and in issuing permits. Nonetheless, EPA's "oversight" has in some cases increased and has been administered with varying degrees of sensitivity to the desires of state regulators and local and regional differences.

9. Address concerns with the reasonable assurance principle by modifying the TMDL program requirements to provide that effluent limitations in NPDES permits derived from TMDL waste load allocations must be consistent with the relative contributions of that permittee to the impairment of water quality in a water body and that effluent limits based on an approved TMDL will only be set at a level where they reasonably can be expected to contribute to the attainment of water quality. If not automatic, such an approach could be used in an adaptive management framework that could use a cost-benefit analysis and not impose more stringent allocations/permit limits on point sources until nonpoint source contributions have been addressed.

   EPA has taken the position that where both point and nonpoint sources contribute to the impairment of a water body, a facility's waste load allocation is based, in part, on considerations of nonpoint source load reductions for which there are "reasonable assurances that nonpoint source control measures will achieve expected load reductions." In other words, for the TMDL to be approvable, unless there are reasonable assurances that the nonpoint sources will achieve specific load reductions, NPDES permittees bear the entire burden of reducing pollutant loadings to achieve the TMDL's objectives. This can result in more stringent discharge limits and costs for utilities that will achieve little or no improvement in water quality because the impairment is being caused primarily by nonpoint sources.

10. Anti-backsliding provisions of the CWA and implementing regulations should be amended to allow NPDES permits to include less stringent limits in certain, limited circumstances, for example when new data and information indicate that the receiving water can safely accommodate an increased loading, and if water quality standards will not be exceeded or no significant adverse effects on the designated uses are anticipated. Current backsliding provisions discourage voluntary or early action to improve treatment processes to address additional pollutants.

    The 1987 Water Quality Act added Sections 402(o) and 303(d)(4) to incorporate anti-backsliding provisions. These provisions, and their implementing regulations, 40 CRF 122.44 and 122.62(a), significantly constrain the ability of the permitting authority to adjust NPDES permit conditions upon permit renewal or modification when new information indicates that the receiving water can accommodate an increased discharge and create unnecessary conservatism in the permitting process. These provisions discourage voluntary or early action to make improvements in treatment processes to remove additional pollutants. There should be an evaluation whether permitting assumptions are appropriate and an ability to change those assumptions when they are not needed regardless of previous permitting decisions. If circumstances are such that changes in permit limits could be included and would not otherwise cause a violation of water quality standards, or cause significant adverse effects on the designated uses, permit limits that are less stringent than the prior permit should be allowed.

Regulations Needing Repeal or Modification

1. Repeal 40 CFR Part 503, Subpart E, which is now duplicative and in some instances in conflict with the provisions of the new Sewage Sludge Incinerator (SSI) Maximum Achievable Control Technology (MACT) regulations. Remove unnecessary Clean Air Act requirements (40 CFR part 61, subpart E) as referenced in 503.43(c) and 40 CFR Part 60 Subpart O that are no longer relevant given the new SSI MACT Standards.

    EPA's Office of Air and Radiation has made it clear that 40 CFR Part 503, Subpart E is no longer relevant and not as protective of public health as the SSI MACT regulations promulgated in 2011. Currently, more than 100 clean water utilities are required to comply with the provisions in both rules, requiring different monitoring and reporting. The Clean Air Act provisions in Part 60, Subpart O and Part 61, Subpart E, are similarly now duplicative or unnecessary given the new MACT standards for SSIs.

    EPA should also review and consider revisions to its definition of solid waste to encourage and enable greater energy recovery from SSIs.

2. In line with the water sector's move toward the Utility of the Future, revise existing biosolids regulations and/or develop a new regulatory structure to ensure that products derived from the wastewater treatment process are regulated based on their final quality and not on their source.

    More and more utilities are creating beneficial products from their wastewater treatment process, including improved quality of biosolids, recovered resources like nutrients and struvite,

and recycled/reclaimed water. In Europe, these resources are acknowledged as products that are not appropriate for control under rules established for wastes. In the U.S., EPA has made progress issuing policy statements allowing some flexibility with these materials, but more certainty is needed to further spur resource recovery and encourage innovation at clean water utilities.

3. Modify existing NPDES permit regulations to allow for more flexibility in establishing permits limits (e.g., new approaches like stochastic permitting).

   Meeting single number, not to exceed permit limits requires utilities to operate their plants to achieve levels significantly lower than established permit limits to ensure there is a sufficient margin of safety and that there are no exceedances. New techniques including stochastic permitting and new technologies, including sensors, will enable new permitting approaches that provide a range of values within which the discharge will be considered in compliance. This type of flexibility may require a rethinking of how permit limits are derived, but it will allow utilities to run their treatment plants more efficiently and cost effectively.

4. Revise the 1997 affordability guidance to eliminate reliance on median household income consistent with the Agency's 2014 affordability framework.

   NACWA has sought revisions to EPA's 1997 affordability guidance (Combined Sewer Overflows – Guidance for Financial Capability Assessment and Schedule Development) for more than a decade. While EPA's 2014 affordability framework document has addressed many of NACWA's concerns – including reliance on median household income as the sole indicator of affordability – the framework is still characterized as an addendum to the original guidance. In practice, EPA's regional offices continue to use the guidance as the starting point in affordability negotiations and utilities are often pressured into performing the calculations in the guidance to evaluate spending levels versus median household income levels.

5. Revise current pretreatment regulations or seek other mechanisms to automatically apply the Non-Significant Categorical Industrial User (NSCIU) provisions of the Pretreatment Streamlining Rule nationwide, including in Authorized States that currently have not incorporated all of the Streamlining Rule.

   EPA adopted the Pretreatment Streamlining Rule in response to an earlier presidential effort to reduce burdensome regulations. Since promulgation of the rule, however, several Authorized States have yet to revise their state regulations to incorporate key provisions, including the NSCIU category, which has the potential to save utilities significant time and resources.

Recommendations Regarding EPA's Organizational Structure & Enforcement Priorities

EPA should consider organizational changes to return primary enforcement authority and personnel to the program offices. In addition, EPA should evaluate the return of delegated authority for certain actions from Regional offices to Headquarters, but at the very least improve coordination between Regional offices and Headquarters to ensure greater consistency nationwide. Additionally, EPA should provide compliance and

technical assistance to utilities with potential CWA violations before initiating formal enforcement actions, especially with smaller utilities.

EPA enforcement personnel often interpret regulations, policies and permit requirements differently, and in conflict with the program office personnel who write those program requirements and regulations and who interface regularly with the regulated community. This subjects permittees to uncertainty, unnecessary risk and potential enforcement action. EPA regional offices also sometimes interpret regulatory requirements differently from one another, subjecting permittees in different regions to inconsistent regulatory requirements and interpretation, contrary to the intent of the CWA.

In addition, EPA often brings enforcement actions against utilities for compliance violations without first providing any help or assistance for the utility to come into compliance. This is a particular challenge for smaller utilities that may not have the resources or technical capacity to address compliance shortcomings. If EPA were required to first provide compliance and technical assistance to at-risk utilities and only initiate enforcement proceeding if the assistance is unsuccessful, potential CWA violations could be addressed in a much more timely and cost-effective manner for all parties involved.

Again, thank you for the opportunity to provide input into improving the regulations that implement the Clean Water Act and related statutes. NACWA's members are not interested in losing the gains in water quality from the past four decades that they have played a significant role in achieving. The thoughts above were identified as opportunities to improve the current system to enable greater environmental and public health protection – with a focus on net environmental benefit outcomes – while also maximizing use of ratepayer dollars.

NACWA looks forward to discussing these issues further with the administration. Please contact Chris Hornback, NACWA's Chief Technical Officer at chornback@nacwa.org, or Nathan Gardner-Andrews, NACWA's Chief Advocacy Officer at ngardner-andrews@nacwa.org, with any questions or to set up a time to discuss.

Sincerely,

Adam Krantz
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