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December 14, 2012

Denise Keehner, Director
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USEPA Headquarters
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1200 Pennsylvania Avenue, N. W.

Mail Code: 4501T

Washington, DC 20460

Submitted Via email to: 319grants@epa.gov

Re: *Nonpoint Source Program and Grants Guidelines for States and Territories, November 8, 2012 Public Review Draft*

Dear Ms. Keehner,

The Association of Clean Water Administrators (ACWA) (hereinafter “the Association” or “states”) appreciates the opportunity to provide comments on the U.S. Environmental Protection Agency’s (EPA) *Nonpoint Source Program and Grants Guidelines for States and Territories, November 8, 2012 Public Review Draft* (hereinafter “draft guidelines”). The Association is a national, nonpartisan, professional organization, representing State, Interstate, and Territorial water quality control officials (hereinafter states or states/interstates) responsible for the implementation of surface water protection programs throughout the nation, including nonpoint source (NPS) management programs under Clean Water Act (CWA) § 319.

We first would like to express appreciation for the Agency’s collaborative EPA-state approach that informed the development of the draft guidelines. Several states were represented in extensive EPA-State discussions that took place both before and after the June 2012 national NPS meeting (i.e., “Shaping the Future of the Clean Water Act § 319 Program”) and in the EPA-state workgroup process that followed via teleconference calls held from July to September 2012. This process is an excellent example of the benefit of early and ongoing co-regulator engagement that we encourage EPA to continue with this and other CWA regulatory initiatives going forward.

We also appreciate the Agency hosting an EPA-State call on November 26th to discuss the final version of the draft guidelines and to respond to clarifying questions during the public comment period. Although many of the states’ concerns were mitigated via the earlier EPA-State workgroup process, below we offer some remaining areas of concern for states that were highlighted on the November 26th call and/or the

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Association received in subsequent feedback from our member state/interstate agencies. We believe this additional feedback will be of assistance to EPA as it finalizes the guidelines. Also included is a section listing areas where further clarification would be useful. The Association would like to note that the feedback and comments below are not necessarily shared by every state/interstate surface water program. We encourage EPA to also consider any individual state/interstate comments that it receives.

I. State Monitoring of National Water Quality Initiative (NWQI) Projects (See Sections II.D.i (pp. 8-9); VIII.E.iii. (p. 26); and IX.D (p. 35)

During the November 26th call, and in subsequent follow-up with the Association, several states expressed concerns with the above-referenced sections of the draft guidelines that instruct states to use § 319 or other CWA funds to monitor results of the Environmental Quality Incentive Program (EQIP) projects, administered by the U.S. Department of Agriculture's (USDA) Natural Resources Conservation Service (NRCS), that are funded under NWQI. Although the Association's members recognize the value and need for coordinated efforts across state and federal agencies in addressing nonpoint source pollution, with respect to the draft guidelines as presently worded states have highlighted the following specific issues, challenges, and barriers related to the directives pertaining to the NWQI program:

1.) *Leveraging scarce state resources to monitor a comparatively well-funded program*

While states support targeting a portion of EQIP funding to impaired watersheds with agricultural NPS contributions, many note a significant disparity in NRCS program funding as compared to state NPS funding available for monitoring. In several states USDA-NRCS has considerably more funds available to monitor the results of NWQI than the state's NPS program.¹ States are therefore concerned that it is inequitable to expect state water quality programs to use limited resources, particularly nonpoint source funds, to monitor results for an agricultural program that is comparatively well funded.² Additionally, some states do not routinely apply § 319 funds or other resources to monitor the effectiveness of practices of any kind given a lack of sufficient resources. Instead, those states find it more cost-effective to continue to rely on modeling to determine load reductions from individual practices and ongoing water quality monitoring programs.³

¹ For example, in Vermont where EQIP funding is relatively high while § 319 funding is relatively low, the 5% of EQIP funds channeled to NWQI watersheds approaches the 50% of § 319 funds that must be put towards watershed project implementation across the entire state.

² A further example concerns the EQIP practice most implemented in Illinois, Forest Stand Improvement (CP666), which is not targeted to improve water quality albeit there will be some water quality benefit if the practice is used to manage understory and not tree cutting. The fourth most implemented practice, Nutrient Management (CP590), is a planning activity for the entire farming operation, and it may or may not be followed. Additionally, there is no way to track where certain nutrient reduction/timing activities took place within the farming operation in any given year. Most farming operations cover several watersheds making the tracking impossible. The second and third most installed practices are Water and Sediment Control Basins (CP638) and Grassed Waterways (CP412), which do have an impact on water quality.

³ For example, New Hampshire - which relies heavily on modeling - looks to the Volunteer River Assessment Program and the Volunteer Lake Assessment Program to measure progress in receiving waters.

2.) *Information barriers that prevent adequate quality assurance (QA)*

Providing § 319 funding for monitoring activities requires a Quality Assurance Project Plan (QAPP). In order to develop an approvable QAPP, states must be able to identify locations and types of conservation practices (i.e., best management practices (BMPs)) installed in NWQI watersheds in order to properly monitor and demonstrate their effectiveness. However, at present there is a legislative barrier under Farm Bill Section 1619 which prevents states from accessing this information due to confidentiality concerns. While some states have been successful in negotiating agreements with NRCS to gather information about the basic locations and types of conservation practices installed, others have not. This information barrier should be addressed if states are to provide meaningful monitoring of NRCS practices. The NRCS should be encouraged to cooperate with states to disclose BMP type and location to ensure accurate and complete monitoring and approvable QAPPs. ACWA also recommends that alternatively, where information barriers remain, and given the aforementioned disparity in resources, NRCS should be responsible for monitoring NWQI projects with technical assistance and quality assurance support provided by state nonpoint source and monitoring programs as practicable.

3.) *Clarify the level of state commitment expected*

On the November 26th EPA-state call, EPA indicated that states should simply be prepared to assist in NWQI project monitoring with § 319 or alternate funds. However, as currently worded the language in the draft guidelines is more prescriptive.⁴ Therefore, ACWA recommends that EPA consider revising this language in the final guidelines to better reflect the scope and level of commitment expected of states with respect to NWQI project monitoring with § 319 funds.

II. Viable Alternatives to Nine Element Watershed Based Plans (WBPs)

States appreciate that the draft guidelines provide EPA Regions with flexibility to consider state alternatives as substitutes for the draft guidelines emphasis on the development of a “Nine Element WBP.” (*see* Section V.A (p.16)). During the November 26th EPA-state call, several state participants advocated that EPA consider allowing an approved Total Maximum Daily Load (TMDL) Implementation plan to serve as a substitute for the recommended nine element WBP. EPA indicated it would be interested in feedback as to how a TMDL plan could meet the nine elements by default, and therefore, serve as a viable substitute. ACWA received the following feedback to offer for EPA’s review:

1.) *Suggestion to allow the use of TMDL studies that include implementation plans and reasonable assurances of implementation as a viable substitute*

The State of Ohio, for example, offered several examples of highly successful NPS projects and successes resulting from the implementation of recommendations within a

⁴ e.g., “States will devote § 319 or other resources to monitor...” (Section II.D.i), “states are responsible for executing monitoring activities...” (Section IX.D), and “States with NWQI watersheds recommended by the state water quality agency will plan for ...” (Section IX.D) [emphasis added]

TMDL implementation plan funded with § 319 grant funding. All Ohio TMDL studies include a detailed implementation plan with rather specific sets of projects and/or BMP recommendations. Recommended implementation actions in the TMDL are linked to critical areas identified during the modeling, assessment, and monitoring phases of TMDL development. Recommended actions and practices are consistent with BMPs and deliverables used in NPS grant programs such as § 319, Surface Water Improvement Grants (SWIF), and Water Resources Restoration Sponsorship Program (WRRSP) grants. Ohio coordinates eligible BMPs in TMDLS with Link Deposit Loan Programs for NPS practices funding with Ohio's State Revolving Fund (SRF) Program. Ohio's TMDL approval process includes significant public and stakeholder outreach.⁵ Ohio NPS-based TMDLs completed in recent years include an implementation plan that has a reasonable assurance of being implemented, even though these plans may not always capture each of the nine elements required for WBPs in the draft guidelines. Ohio is relying on the continued ability to provide implementation funding for projects in WBPs, which is critical for achieving continued success in restoring NPS impaired waters that have TMDLS with completed and approved implementation plans. However, not all of these streams have nine element WBPs completed. Therefore, ACWA recommends that EPA incorporate language in the final guidelines that will continue to allow states to award implementation funding under § 319 to watersheds that have an approved nine element WBP, *or alternatively TMDL studies that include implementation plans and reasonable assurances of implementation.*

2.) *A TMDL implementation plan should serve as a substitute when impairments are clearly identified, include only one or few pollution sources, and are in isolated areas separated from other areas of impairment.*

Another example comes from Alaska – and is likely relevant to other states with large areas of low population density and little to no agricultural activities. In such states, impairments can be clearly identified in terms of only one or few pollution sources in isolated areas separated from other areas of impairment.⁶ As a result, planning and implementation can be relatively straightforward and accomplished through a TMDL implementation plan or other alternative planning process. The Alaska Department of Conservation and EPA Region 10 have frequently found nine element WBPs unnecessarily complicated for these isolated waters. As such, the final guidelines should recognize the balance between resources planning and implementation activities that may differ across projects. ACWA recommends that EPA include the following addition to the list of alternatives to WBPs provided beginning on page 32 of the draft guidelines (*See Section IX.B.ii*):

When impairments are relatively straight forward, only one or few pollution sources, and occur in isolated areas separated from other areas of impairment. Where a pollution problem only affects a limited area, i.e., a single creek or small

⁵ e.g., Communication and outreach includes field days, information sessions, public meetings and the participation of local representatives in the TMDL workgroup.

⁶ This is evidenced in the Alaskan waterbodies highlighted on EPA's webpage for § 319 Nonpoint Source Success Stories

waterbody segment, planning and implementation can be relatively straightforward and may be accomplished through a TMDL implementation plan or other alternative planning process.

Similarly, Colorado has a significant number of implementation projects located in remote/sparsely populated areas (e.g., implement mine-related TMDLS). Therefore, ACWA recommends that EPA consider including Reclamation plans that address site-specific impairments relating to discreet sources of pollution, with a limited number of stakeholders and in remote areas, as an acceptable alternative to a nine element WBP.

3.) *Other recommended additions to list of alternatives in Section IX.B.ii):*

- a. Implementation plans incorporated in approved TMDLs, as long as the implementation plan and proposed implementing work plan include the five bulleted items listed on pp. 32-33.
- b. Where an impairment is caused by a limited number of readily identified sources and landowners and where commitment to address the NPS discharges is obtained from such landowners.⁷
- c. Approved Acid Mine Drainage and Abatement Treatment plans (AMDATS) and others such as Phase II Diagnostic Studies (for inland lakes) as plans that would generally meet the criteria of suitable alternatives.

III. Coastal Zone Act Reauthorization Amendments (CZARA) Implementaton (See Section VIII.D (p. 24)

ACWA recognizes the importance of advancing coastal states' efforts toward completion of approvable state coastal nonpoint pollution control programs (CNPCPs). However, states have some concern with the draft guideline requiring a \$100,000 set-aside annually to go toward completing the development of an approvable CNPCP. Many of those states may currently have final approved CNPCPs and will not be required to employ the set-aside in the immediate future. However, it is currently unclear whether the set-aside only applies to CNPCPs that are not fully approved and is not intended to apply more broadly into the future.⁸ Additionally, the fixed set-aside amount seems inequitable for smaller coastal states that may receive substantially smaller total awards. Therefore, ACWA recommends EPA clarify the future implications, if any, of this Section of the guidelines. Additionally, EPA should consider allowing more flexibility for coastal states to work with their Regions to

⁷ For example, Rhode Island Department of Environmental Management delisted an impaired water and obtained a § 319 success story by working with a single landowner to remove a single pollutant source.

⁸ For example, for states with approved CNPCPS, if CNPCP regulations and requirements were to change in the future, it is unclear whether state would then be required to put an often substantial portion of their overall § 319 award towards bringing this other program into compliance.

determine what level of funding may be necessary to reach full approval of their CNPCPs. In the alternative, requiring a percentage of the total § 319 award, rather than a fixed amount, may alleviate issues of inequity.

IV. Relationship to Performance Partnership Grants (PPGs) (See Section VIII.H (p. 30))

This Section of the guidelines appears to nullify some of the efficiencies gained by participation in PPGs. The guidelines on page 30 state, “[s]tates are required to submit work plans, annual reports, and to provide reporting under the Grants Reporting and Tracking System (GRTS) at the level of detail to ensure that EPA regions can measure and track outcomes and outputs to ensure accountability.” States participating in PPGs are already required to meet these criteria. Any additional reporting in GRTS should be designed to avoid redundancies and duplicate reporting, and the final guidelines should further clarify the level of detail required in GRTS for PPGs and what the associated mandated elements within GRTS would be. Additionally, Section IX.B.ii (pp. 31-32) indicates, “[s]tates must use at least 50% of the § 319 funds (watershed project funds) to implement watershed projects guided by WBPs [.]” and the goes on to emphasize a strong focus on restoration or protection as identified in a state’s NPS Management Program.

A PPG can provide a reasonable budget that splits the funding this way and an accompanying workplan that identifies the deliverables, outputs and outcomes related to Project Implementation and Project Planning. However, it would be difficult to track the actual expenditure of dollars, other than those awarded as separate grants to outside organizations. ACWA recommends that EPA include this distinction in the “Relationship to PPGs” section of the final guidelines.

Finally, section IX.K.ii (pp. 39-40) mentions GRTS updates will include, among other elements, “[t]racking the proportion of watershed project funds spent on restoration and protection activities.” For states that choose to put all or a portion of the § 319 funds into a PPG, there is no tracking of the § 319 funds separately, let alone the portion that is for project verses program implementation, as the appropriations from all PPG funded sources are blended. ACWA recommends that the final guidelines clarify that if § 319 funding is in a PPG, tracking of expenditures at this level of detail should not be required in GRTS.

V. Other areas of the draft guidelines where additional clarification/information would be beneficial

In addition to the above-mentioned concerns and recommendations, the Association also received feedback on specific sections of the draft guidelines where additional information or clarification would be helpful. These are as follows:

- 1.) Preface (p. 1): The preface states that this guidance will begin to be implemented in 2013 and fully implemented in 2014. While this may be covered in each section, an explicit list of changes and the year they are in effect would be helpful.
- 2.) Section V.D. (p. 19): The first sentence in the first paragraph and the first sentence of the third paragraph appear to contradict each other. Are the EPA Regions reviewing all WBPs before implementation can occur or only a subset of plans each year?
- 3.) Section IX.H. (p. 38), and Q (p. 46): Section Q allows up to 10% of the grant award in the NPS program funds to be used for administrative costs, but page 38 of section H states that all staff time, including those that are NPS program funded, have to be described in support of a specific activity resulting in water quality results. Please clarify whether that only includes the sub-granted personnel or state administrative personnel as well.
- 4.) Section IX, K.ii. (p. 40): Much of the information in the GRTS section at the bottom of page 40 describes tracking which will be mandatory, but is not currently an option in the GRTS system. Clarification is needed about the timeline for when this will be mandatory. As written, this information is not limited to the update that is planned for 2013 or 2014, but may include GRTS updates at any point in the future.
- 5.) Section IX.K.iv. (p. 42): Some states have addressed this requirement with their EPA Region via “semi-annual reports”, which have been a project-by-project evaluation (using existing GRTS project evaluations) and references to slippage (i.e., projects behind schedule). It would be helpful for EPA to clarify whether uploading these semi-annual reports into GRTS would not meet the intent of the guidelines, as follow-up guidance from the Region would then be necessary.
- 6.) Section IX.K.vi. (p. 43): In at least one state, project leaders for individual § 319 funded projects that generate water quality-related data have independently handled data sharing such as loading into STORET. If the intent of the draft guidelines is to require or encourage that tracking, or documenting this activity as a required grant project output, please provide that clarification in the final guidelines.
- 7.) Section IX.Q.vi (p. 46): One state suggested the language of this guideline should be clarified to state either that administrative costs “...shall not exceed 10% of the grant award, which equals federal grant funds plus nonfederal match,” or “...shall not exceed 10% of the grant award, which equals federal grant funds excluding nonfederal match.”

We thank EPA again for the opportunity to comment on the draft guidelines. We remain ready to answer any questions that the Agency may have regarding our comments. Please contact our Executive Director and General Counsel, Alexandra Dunn, at 202/756-0600 or at adunn@acwa-us.org, to facilitate these conversations.

ACWA Comments re: *Nonpoint Source Program and
Grant Guidelines for States and Territories*

December 14, 2012

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Sincerely yours,

A handwritten signature in black ink that reads "Steven H. Gunderson". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Steven H. Gunderson
Director, Water Quality Control Division
Colorado Department of Public Health & Environment
ACWA President

Cc: Office of Wetlands, Oceans, and Watersheds, Office of Water, USEPA:
Benita Best-Wong, Deputy Director
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