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January 10, 2014
(resubmitted in final form)

Maryann Froehlich
Acting Chief Financial Officer
Office of the Chief Financial Officer
U.S. Environmental Protection Agency

Re: *Draft 2014-2018 U.S. Environmental Protection Agency
Strategic Plan*; Docket ID Number EPA-HQ-OA-2013-0555

Dear Acting Chief Froehlich,

For more than 50 years the Association of Clean Water Administrators (ACWA) has served as the voice of state, interstate, and territorial officials (hereinafter “states”) responsible for the implementation of programs that protect surface water, many under the Clean Water Act (CWA). ACWA appreciates the opportunity to comment on both the water quality goals and enforcement measures of the *draft 2014-2018 U.S. Environmental Protection Agency Strategic Plan* (hereinafter “Draft Strategic Plan”). This continues to be an ambitious undertaking for the U.S. Environmental Protection Agency (EPA) and applaud the Agency for its efforts to assess program outcomes and outputs. Like states, EPA is making difficult decisions regarding resource prioritization and risk management. We remain committed to working with the Agency as it moves towards a Final Strategic Plan, particularly as EPA seeks to incorporate the comments below.

Since the passage of the CWA in 1972, states and the federal government have worked proactively to foster regulatory partnerships. EPA provided assistance in achieving significant improvements in water quality through a combination of policy, regulation, and funding. However, a concerning trend has developed over the last decade, jeopardizing the co-regulator relationship and the achievement of on-the-ground environmental improvements. This trend is increased CWA substantive and administrative requirements paired with stagnant or decreased CWA funding – together undermining the implementation of core CWA programs. As such, any Final EPA Strategic Plan must include more detailed discussion of the need for an improved relationship with state and interstates as *co-regulators*.

As an overarching comment, in the Final Strategic Plan we urge EPA to more intentionally discuss the pollution reduction results delivered by cross-media programs, issues, and goals as part of the Agency’s cross-

cutting strategies.¹ While structuring the Draft Strategic Plan around four environmental media goals plus enforcement/compliance serves an organizational purpose, in reality environmental challenges know no such boundaries. For example, a number of air program initiatives will help to mitigate greenhouse gases which are contributing to extreme weather, or to reduce air deposition of pollution to surface waters thereby advancing the effectiveness of surface water initiatives. Several solid waste initiatives will help to prevent surface water pollution. A clear discussion in the Final Strategic Plan of cross-media approaches *to pollution problems* will advance the Agency's "One EPA" focus – a focus supported by state, interstate, and territorial regulators and one which should be clearly articulated as a key way EPA plans to implement its strategy to "Embrac[e] EPA as a High-Performing Organization."²

Our specific comments below and are focused on Goals 2 and 5 of the Draft Strategic Plan and refer to the cross-cutting strategy of Launching a New Era of State, Tribal, Local, and International Partnerships."³

Comments on Goal 2: Protecting America's Waters

Overview (p. 16-18)

- ACWA supports the development of tools which will help make solid water quality, regulatory, and public health decisions, and appreciates EPA's efforts in the draft strategic plan to highlight the importance of data in decision-making.⁴ Thoughtful use of data will benefit clean water and improve the efficiency and efficacy of state-federal partnerships. New technology⁵ that improves data accessibility and transparency will lead to smarter usage of limited collective resources.

One area where EPA is placing emphasis on data is via electronic reporting and associated tools.⁶ These approaches can improve facility compliance and lead to direct and indirect water quality enhancements. States recently provided EPA with many recommendations that will improve the overall efficacy and implementation of the proposed NPDES Electronic Reporting Rule.⁷ Given the significance of states' comments, we emphasize the importance of EPA undertaking a supplemental notice of proposed rulemaking for this regulation. We also recommend that in the Final Strategic Plan, EPA express that it will work with states to develop and support implementation of this specific rule and related tools.

ACWA is concerned that the Draft Strategic Plan Goal 2 makes only passing reference to the effective maintenance, support, and investment in existing core CWA programs such as the NPDES program⁸, stormwater program⁹, and the Concentrated Animal Feeding

¹ *Draft 2014-2018 U.S. Environmental Protection Agency Strategic Plan* at 4-5.

² *Id.* at 4, 57-59.

³ *Id.* at 53-54.

⁴ *Id.* at 17, 19.

⁵ *Id.* at 22.

⁶ *Id.* at 44, 57, 58.

⁷ NPDES Electronic Reporting Rule, Proposed Rule, 78 Fed. Reg. 46006-116 (July 30, 2013).

⁸ *Id.* at 44 (Discussion of NPDES limited solely to Proposed E-Reporting Rule).

Operation (CAFO) program¹⁰. While the range of new initiatives contained within the Draft Strategic Plan are ambitious and important, the Agency's commitment to investment in and support for the existing core water program must be explicitly stated in any Final Strategic Plan. 46 of the 50 states are currently authorized to implement the National Pollutant Discharge Elimination System (NPDES) permit program¹¹, and as such are designing and issuing permits to dischargers and are responsible for assuring compliance with the permits and the requirements of the CWA. Since the inception of the NPDES program, the number of facilities required to have NPDES permits has grown by more than a factor of 10, and states expect this universe to continue to grow. This increase in the total number of facilities covered under the NPDES permitting program has greatly outpaced state and federal resources. Likewise, the nature of the permit universe has changed in character, causing the workload to increase dramatically. States must now not only manage traditional municipal and industrial discharges, but also thousands of sources related to construction, urban runoff, animal feeding operations, pesticides, and wet weather discharges. Similarly, the number of regulated stormwater sources greatly exceeds agency capacity to provide them individual attention. These sources have commonly been regulated through general permits that specify pollution control practices rather than via individual permits with numerical discharge limits and effluent monitoring. Stormwater monitoring requires considerable expertise and investment to align stream impacts with off-stream sources.

Again, while Strategic Plans tend to highlight new initiatives, it would be a significant oversight for EPA to omit from a Final Strategic Plan maintenance and support of the existing core water program, the effort to overhaul the water quality standards regulations and their subsequent implementation, as well as initiatives to maintain and enhance wastewater treatment infrastructure, as key Agency strategic priorities to be carried out in partnership with state co-regulators.

Objective 2.1: Protect Human Health (p. 18-19, 70)

- ACWA supports EPA's continued work with states on a regulatory framework for hydraulic fracturing and natural gas extraction¹², with EPA's recognition that much such regulation will occur at the state and local level. Exploration of regulatory frameworks is important to developing the flexibility needed for successful co-regulation of these processes.
- ACWA supports the draft Strategic Measure for maintaining safety of swimming waters.¹³ However, we emphasize that states do not have the financial resources to maintain the same level of public health protection without continued EPA support of the BEACH Act created monitoring program. This measure will be compromised by EPA's proposed cut of the BEACH Act monitoring program. Many states rely solely on EPA's

⁹ Id. at 22 (Stormwater management included in parenthetical about general water resource management).

¹⁰ Id. (CAFO program not discussed at all).

¹¹ <http://cfpub.epa.gov/npdes/statestats.cfm>

¹² See *Draft 2014-2018 U.S. Environmental Protection Agency Strategic Plan*, 19.

¹³ Id. at 70.

federal BEACH grants to fund their beach water quality monitoring programs. Loss of federal funding will reduce the size and scope of beach monitoring programs. As such, EPA's Final Strategic Plan should address EPA's current position on cuts to BEACH Act funding.

- ACWA supports EPA's goal to facilitate more complete data sharing from monitoring at public water systems.¹⁴ ACWA recommends that EPA's Final Strategic Plan include reference to the state-EPA initiative to foster increased protection of drinking water sources through improved coordination between CWA and Safe Drinking Water Act (SDWA) programs at the national, regional, state, and watershed scales. This initiative is a key piece of achieving EPA's overall strategic goals.

Objective 2.2: Protect and Restore Watersheds and Aquatic Ecosystems (p. 19-22, 70-74)

- Effective watershed protection requires a comprehensive, integrated balance of resources for monitoring, standards setting, planning, permitting, compliance assistance, inspection, enforcement, nonpoint source management, data management, infrastructure financing, and other related activities. At the most basic level, compliance assistance means helping local communities and businesses comply with environmental laws. ACWA urges EPA to include discussion of the role of compliance assistance in its Final Strategic Plan.
- One of EPA's Priority Goals concerning watershed protection and recovery is to achieve 100 percent state updating of nonpoint source management programs by September 30, 2015 to comport with the new section 319 grant guidelines.¹⁵ To meet this goal, states encourage EPA to continue engagement with ACWA's Section 319 Workgroup as states finalize their management plans and implement the new guidelines. Meeting this goal also will require continued and ongoing engagement with the U.S. Department of Agriculture (USDA), with the Natural Resource Conservation Service (NRCS), and with state agricultural groups to identify implementation issues. This goal can serve as an example of how early engagement with States produce positive outcomes.
- ACWA supports EPA's goal of working with states on a new 10-year vision for implementing and developing Total Maximum Daily Loads (TMDLs) for section 303(d) listed impaired water bodies.¹⁶ The Draft Strategic Plan notes that executing such a vision requires fostering integration across many programs, statutes and agencies¹⁷, and ACWA suggests EPA continue engagement with ACWA's TMDL and Watersheds Committee on efforts related to Vision implementation. ACWA is facilitating state discussions around the six Vision goals and EPA has maintained regular coordination and involvement with EPA as part of these efforts. We encourage EPA to continue to utilize this forum for engagement with states. While this is a non-regulatory effort and does not

¹⁴ Id. at 18.

¹⁵ Id. at 16, 17, 85.

¹⁶ Id. at 20; see also http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/acwa_qa.pdf .

¹⁷ Id.

impose requirements on states or EPA, we believe continuing this effort will improve the State/EPA relationship on the 303(d) program. There is a strong sense of commitment to build on the collaborative process used to develop the Vision, and as states move toward implementation we encourage EPA to maintain its laudable flexible, inclusive, and accessible approach to working with its state co-regulators.

- ACWA supports EPA developing and evaluating a new measure for local improvements in water quality, and particularly supports EPA's creation of a state-EPA workgroup to identify a new 303(d) program to better demonstrate interim progress in water quality improvements.¹⁸ However, it is important to recognize clearly in any Final Strategic Plan that the new measure is still being piloted by states and further discussions are still in order to identify appropriate data analyses that accounts for variability in state priority settings across watersheds.¹⁹
- EPA's goal of ensuring that the nation's rivers, streams, lakes, wetlands, and coastal waters do not degrade (i.e., there is no statistically significant increase in the percent rated "poor" and no statistically significant decrease rated "good") through 2018²⁰ is ambitious, and will require close consultation with states, as EPA and states must work together to determine if the described goals are realistic considering current funding levels and the management resources available during the next five years. Given uncertainty regarding the scope of federally jurisdictional wetlands, and that there are many unassessed waters which are only beginning to be properly monitored and measured, baseline setting will be difficult. EPA's Final Strategic Plan should state that the Agency will work with states to develop these baselines and the initiatives to reach them.
- Similarly, the listed goals in the strategic measurement framework for the water quality of the Great Lakes, Chesapeake Bay, Gulf of Mexico²¹, Long Island Sound, Puget Sound Basin, and US-Mexico Border²² must be evaluated in the context of the current funding realities. ACWA supports protection of these culturally and ecologically important waterbodies, but also emphasizes that EPA state that it will work closely with the states

¹⁸ Id. at 61-62, 71, 73.

¹⁹ See discussion in *Draft 2014-2018 U.S. Environmental Protection Agency Strategic Plan*, 61. For example, if a state has two separate "priorities" within one single watershed and it meets the first commitment, using EPA's current proposed method of data analysis there will be no recognition that any commitment has been met. The catchment will still show that no TMDL or alternative has been established until all necessary plans are firmly in place. One potential remedy for this would involve performing the GIS evaluation in an iterative manner, based on designated uses to how different levels of water quality or TMDL attainment or by identifying an "in-progress" category for places where some work has been done but not all plans have been completed. States will be better served to have such a discussion once the state examples from the pilot effort are processed and discussed with EPA.

²⁰ See *Draft 2014-2018 U.S. Environmental Protection Agency Strategic Plan*, 71, 72.

²¹ It would be appropriate for EPA to, in the Final Strategic Plan, refer to *both* the Mississippi River and the Gulf of Mexico. Id. at 23 note 3, 72.

²² Id. at 72-73.

near these waterbodies to determine if the goals set forth in any Final Strategic Plan are realistic.

- The Columbia River Basin is not included in the list of specialty areas.²³ The Basin was designated as a Large Aquatic Ecosystem Council member in 2008, and was included in the 2009 EPA Strategic Plan. The health of the Columbia is vital to the Pacific Northwest. Including it in the Final Strategic Plan will be important as the Basin is the focus of significant multi-state and tribal toxics reduction work, as well as many other important tribal initiatives.

Comments on Goal 5: Protecting Human Health and the Environment by Enforcing Laws and Assuring Compliance

Overview (p. 42-45)

ACWA acknowledges the importance of compliance assurance to sound environmental regulation, and supports EPA efforts to innovate compliance measures.²⁴ However, ACWA strongly recommends that the Final Strategic Plan not treat enforcement and compliance as a separate Goal, but instead approach enforcement and compliance as cross-cutting strategies intrinsically connected with the other Goal areas – as enforcement is a tool used in achieving all of EPA’s pollution control goals.

ACWA is concerned by the absence of any mention of the CWA Action Plan, as significant planning and discussion was involved in its creation because of its important role in achieving CWA compliance going forward. The Final Strategic Plan should mention the CWA Action Plan in the discussion of *Protecting America’s Waters*.²⁵

While ACWA supports the variety of compliance assurance efforts set out by EPA in the Overview²⁶, ACWA urges EPA in its Final Strategic Plan to more clearly discuss and prioritize compliance assistance as a tool to achieve the goals set forth by EPA.²⁷ Compliance assistance is distinguished from compliance assurance as a more preemptive, preventative approach achieved largely by outreach and education which assists communities, individuals, and entities in following and understanding what is required of them by law. Failing to discuss the value of compliance assistance efforts leaves an important regulatory resource untapped, one which is needed in light of stagnant and decreased funding for many projects and programs. In most states, traditional enforcement goes "hand-in-hand" with other types of compliance initiatives. States seek to maximize compliance by employing integrated approaches of compliance assistance, compliance incentives, inspections, and traditional regulatory enforcement. States believe they are in the best position to understand local stakeholder priorities/needs, and thus determine the most appropriate mechanism for improving compliance. States also believe the best enforcement response is the one that produces and maintains compliance in the most

²³ Id. at 72.

²⁴ Id. at 42.

²⁵ Id. at 43.

²⁶ Id. at 42-45.

²⁷ Discussion of compliance assistance should be added to the Next Generation discussion of pollution prevention at 62-63.

efficient and timely manner. ACWA recommends that EPA's Final Strategic Plan include a commitment in the Overview section for the Agency to work with states to better, and to develop a strategic measure for, value compliance assistance.²⁸

- **Protecting America's Waters (p. 43)**

From the outset, environmental compliance systems were created to identify violations through some regularized inspection schedule, and included reporting requirements. Upon the identification of reviewable violations, regulators would then make a decision regarding enforcement in a system designed to ensure that the most egregious violations were promptly identified. Although states and EPA have varied violation responses, this basic pattern of reaction versus proaction remains prevalent. ACWA recommends EPA include in its Final Strategic Plan a commitment to work with states on a mutual commitment to changing established practices and focusing on improved results.

- ACWA supports the Office of Enforcement & Compliance Assurance's (OECA's) prioritization of combined sewer systems (CSOs), sanitary sewer systems (SSOs), municipal separate storm sewer systems (MS4s), and the Concentrated Animal Feeding Operations (CAFOs) sectors.²⁹ These are high priority universes in many states as well. ACWA and many of its members also have prioritized energy extraction activities, and suggests that EPA add this category of activity to *Protecting America's Waters*.

Next Generation Compliance (p. 42, 44, 64)

States support EPA broadening the scope of national enforcement initiatives to include innovative programs associated with Next Generation Compliance.³⁰ In particular, states recommend EPA's Final Strategic Plan emphasize the importance of increased investment in:

1. Better regulations and more simplified permits, allowing for both flexibility and certainty, with a focus on mechanisms for achieving compliance and environmental results.
2. Greater use of eReporting and eBusiness tools that help to improve transparency and streamline regulatory responses.
3. Greater levels of transparency and information accuracy through updated data exchange protocols and technologies.
4. Focus on managing, assessing, and reducing those discharges that create real water quality impacts.
5. Identifying and piloting innovative compliance monitoring and assessment initiatives.
6. Rethinking the value of compliance assistance and how program success is measured.
7. Exploring social and market driven pressure points that successfully result in permittee behavior change and increased compliance.

²⁸ The commitment to develop such a measure would be included in the table at 64; EPA also should articulate a Strategic Measure regarding compliance assistance at 83.

²⁹ Id. at 43.

³⁰ Id. at 42, 44.

8. Embracing a wide variety of administrative tools that can more quickly return a facility to compliance.
9. Better co-regulator understanding of the impact and role of formal enforcement actions.

Most Next Generation Compliance initiatives will require an investment in human capital and information technology (IT) resources, before they deliver the longer term promise of cost savings and improved compliance rates. EPA's Final Strategic Plan should include development of a measure regarding the shift in resources to support Next Generation initiatives, and to assess the impact of these shifts on permit renewals, inspections, and enforcement actions. Likewise, some states are facing more complicated internal requirements and processes for updating state IT data systems. These state water programs are facing real challenges with implementing defensible technological solutions that will provide more efficient and effective programs, even when funded with outside resources. Financial support for traditional water quality protection is not likely to increase dramatically over the next few years. At both the federal and state levels, competing priorities and a history of success will make it difficult to garner more support than is already in place. And while we have made significant progress in assessing and improving our nation's water since 1972, the low hanging fruit has been collected and over the next 40 years we face issues that are much more complex technically, economically, politically, and socially.

Permitting

EPA can and should do more to design regulations and permits that are easier to implement, and that will result in higher compliance and improved environmental outcomes. ACWA recommends that EPA's Final Strategic Plan prioritize innovation in permitting as a part of Goal 2 as well as Goal 5. ACWA also recommends that EPA include in the Final Strategic Plan language calling for usage of existing mechanisms to increase permitting efficiency, especially usage of general permits to increase administrative efficiency for the states.

Enforcement Approaches

Over the last four decades, states and EPA have worked together as co-regulators to implement and improve the CWA programs. While there has not always been agreement regarding national and state program priorities, it has always been agreed that Congress intended for states to implement the NPDES program. As of today, forty-six states have been authorized to administer the core NPDES program. As authorized programs, states have primacy over day-to-day operations and are dependent upon program data to make high quality, scientifically defensible, and legally enforceable programmatic decisions.

States appreciate EPA's effort to work with states to embrace new technology, improve public data accessibility and transparency, and to more effectively use limited collective resources. States recognize the benefits electronic reporting and associated tools to support the protection of human health and the environment. States also believe that converting to electronic reporting can improve facility compliance and both directly and indirectly improve water quality. The Draft Strategic Plan highlights the eReporting Rule³¹ and refers to its anticipated benefits. ACWA urges EPA to, in the Final Strategic Plan, make clear that EPA plans to work closely

³¹ Id. at 44, 58.

with states, through a supplemental notice of proposed rulemaking and other mechanisms, to address state comments and concerns with the proposed rule to ensure smooth implementation.

Conclusion

Changes must be made in how EPA and the states work together to ensure that the water quality improvements accomplished over the past few decades remain intact, and to facilitate our response to current and future environmental challenges. Together, we must restore an effective, collaborative State-EPA partnership as well as adequate federal funding. ACWA urges EPA to more prominently include these themes in its Final Strategic Plan.

ACWA appreciates the opportunity to provide comment on the Draft Strategic Plan, and urges consideration of our comments as the Agency develops a Final Strategic Plan. If you have any questions regarding our comments, please contact ACWA's Executive Director & General Counsel, Alexandra Dunn, at 202-756-0600 or adunn@acwa-us.org.

Sincerely,



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