

Date: March 19, 2024

To: U.S. Environmental Protection Agency
EPA Docket Center, Water Docket, Mail Code 28221T
1200 Pennsylvania Avenue NW,
Washington, DC 20460

Attention: Kathryn Kazior, Office of Wastewater Management, Environmental Protection Agency

Re: Docket ID No. EPA-HQ-OW-2023-0475: Draft Guidance for Future National Pollutant Discharge Elimination System (NPDES) Permitting of Combined Sewer Systems

The Association of Clean Water Administrators (ACWA) submits this letter to the U.S. Environmental Protection Agency (EPA) in response to notice of available *Draft Guidance for Future NPDES Permitting of Combined Sewer Systems* (draft guidance). ACWA is the independent, non-partisan, national organization of state, interstate, and territorial clean water program directors (hereinafter “states”), responsible for the daily implementation of the federal Clean Water Act (CWA), including permitting of combined sewer systems.

General Overview

ACWA and the states it represents, feel strongly that EPA’s collaboration efforts must always take the necessary time and initiative to share draft guidance language with their regulatory peers, prior to seeking public input and/or finalizing. As previously communicated to EPA informally, a significant amount of time has passed since states and EPA met to discuss CSO challenges, and the Agency would have benefited greatly from sitting down with states more recently to share draft language and discuss in detail the goals of this draft guidance document. And while EPA staff may have sought state input on several of the topics discussed in the draft guidance, the devil is always in the details, and **without** providing actual draft guidance language to react to, states can be surprised by the final product and EPA can be surprised by states’ reactions to it.

States believe the goals of coregulator collaboration are numerous and should ensure that better regulations are drafted, superior policy and guidance is created, necessary flexibility is incorporated, duplication of effort is curtailed, unintended consequences are avoided, greater certainty is realized, legal challenges are minimized, mixed messaging is mitigated, and the public is better served. We would greatly appreciate the opportunity to review the draft language and provide feedback on the next iteration of this guidance.

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States appreciate EPA's upfront disclaimer that this draft guidance "does not create any new legally binding requirements on EPA, states, or the regulated community." Historically, there have been times when EPA staff and 3rd parties have misinterpreted guidance recommendations as mandatory requirements. As EPA is aware, states have a number of priorities, both mandatory and discretionary, that are considered and may choose to adopt similar or different discretionary approaches than those described in this draft guidance document.

Integrated Planning

States support the general description of the integrated planning framework and clarification of the CWA flexibilities to prioritize and sequence, where appropriate, those infrastructure projects that provide environmental and public health benefits. When describing the Integrated Planning Framework in the draft guidance, EPA seemed to create new statutory/regulatory requirements – that prioritization and sequencing "provide the greatest or fastest environmental and public health benefits." EPA should clarify whether this was an intended statement and expectation of municipalities and regulators when pursuing Integrated Planning.

States also support the recommendation that communities allow for adequate time for monitoring, assessing, and planning prior to the completion of activities under their Long-Term Control Plans (LTCPs). Where municipalities have already completed their LTCPs, states support giving municipalities sufficient time to monitor and assess the impacts of LTCPs, before adding additional requirements to an LTCP or new NPDES permit. EPA should recognize this may lead to a short administrative extension/continuation of the current permit while monitoring and assessment occurs.

In the draft guidance, EPA focuses much of the integrated planning discussions on Integrated Plans where the municipality has demonstrated they are meeting the performance objectives of the CSO controls from their LTCP, but the remaining CSO discharges are still contributing to an exceedance of WQS. Some states have noted that there are many waterbodies nationwide impaired for bacteria where CSOs have been separated, have zero discharges, or do not even exist in the watershed. EPA seems to be implying that CSOs with successful LTCPs, should invest significantly more resources for a diminishing return that may never meet the WQS in that watershed. Some states believe the CSO Control Policy allows for incorporation of TMDL CSO wasteload allocation as a potential tool for setting a final, legal, defensible, target for CSO control. States would appreciate the opportunity to further discuss CSO WLAs, prior to draft guidance finalization.

It was unclear from the draft guidance whether EPA prefers to see a temporary or permanent designated use change, while the integrated plan is being implemented, or whether phased-in WQBELs over time in future NPDES permits would be sufficient. States would appreciate the opportunity to further discuss this topic, prior to draft guidance finalization.

Water Quality Standards

States agree that the permitting authority should determine whether an LTCP is meeting its performance objectives. Likewise, states concur it is the permitting authority that determines if future CSO discharges "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard" (40 CFR § 122.44(d)(1)(i))." EPA, in its oversight role, should only object to permitting authority analysis and final decisions, where there is no ambiguity in the statute or regulation. Where it is clear the

permitting authority is neither being arbitrary nor capricious and is providing a reasonable interpretation of the statute or regulation, EPA should provide recommendations and not object to the permit terms, limits, or conditions.

On the topic of Use Attainability Analysis (UAA), some states believe UAAs will never be an option in their state as the perception of environmental depredation supersedes an understanding that achievement of the current designated use will likely never occur without significant depopulation. Other states believe EPA has intentionally made it more difficult and more expensive than needed to get a UAA approved, in an effort to deter usage. In the recent Factor 3 memo, EPA recently communicated that the significant documentation to support UAAs for two CSO permittees was insufficient to justify the alternative use, but failed to discuss how challenging and resource intensive the process was for these two large communities, never mind the challenge for smaller, low income/overburdened communities. States would like to see a streamlined UAA process that would allow for a simpler demonstration to obtain an alternative or temporary use designation.

Climate Change

States support EPA's discussions on using more current data to evaluate precipitation events. The current "typical year" likely differs from that of 50 years ago, 30 years ago, 10 years ago, or possibly even 5 years ago. States understand the value in looking at the most recent historical data. There is also recognition that past operation and maintenance practices may not be as effective, and may now need to consider sea level rise, increased flooding, and other climate change related impacts. The challenge some states have with EPA's discussions on climate change relates to estimating future climate change impacts to model and predict future system performance. There is also recognition that increased precipitation may impact collection system capacity and responses to wet weather events. These projections of potential impacts to CSO discharges, might then be used to create more prescriptive permit terms, limits, and conditions, but there has been significant debate as to whether the current statute and regulations provide for those projections. In litigious parts of the country, these ideas may be more easily considered if an EPA regulation that addresses climate change existed to back-stop permitting authority decisions.

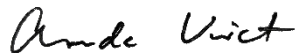
Low Income and Overburdened Communities

States recognize the importance of providing consideration for low-income and overburdened communities. States concur that municipalities should directly engage with residents of low income and overburdened communities to help them get involved early in the planning process and ensure they have the same protection from environmental and health hazards as other communities. States recognize there is some enforcement discretion available when looking at violations that occur at municipalities with low income and overburdened communities. However, there has been debate as to whether the current statute and regulations provide enough clarity for creating disparity in permit terms, limits, conditions, when looking at downstream communities and whether they are affluent or low income/ overburdened. In litigious parts of the country, these ideas would be more easily considered if an EPA regulation that addresses low income and overburdened communities existed to back-stop permitting authority decisions.

Summary

We appreciate EPA's review of ACWA's comments on coregulator collaboration, integrated planning, WQS, TMDLs, climate change, and low income and overburdened communities. While ACWA's process to develop comments is comprehensive and intended to capture the diverse perspectives of states that implement these programs, EPA should also seriously consider the recommendations that come directly from individual states, interstates, and territories. Thank you again for the opportunity to provide comments on this draft guidance. Please contact ACWA's Executive Director at janastasio@acwa-us.org or (202) 756-0600 with any questions regarding ACWA's comments.

Sincerely,



Amanda Vincent
ACWA President

cc: Andrew Sawyers, Director, Office of Wastewater Management
Deborah Nagle, Director, Office of Science and Technology
Chris Kloss, Director, Water Permits Division