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Ken Kirk

May 1, 2009

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**U.S. Environmental Protection Agency
EPA Headquarters, Ariel Rios Building
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Via Facsimile: (202) 501-1450

Dear Administrator Jackson,

The National Association of Clean Water Agencies (NACWA) is seeking your assistance in addressing issues associated with the long-standing practice of blending during peak wet weather flow conditions. The key event related to blending was the December 2005 publication of EPA's proposed peak flow policy, which was based almost entirely on a carefully crafted, negotiated agreement developed by NACWA and the Natural Resources Defense Council (NRDC). The proposal clarified the conditions municipal wastewater treatment plants would need to meet to obtain a Clean Water Act (CWA) permit authorizing the practice of blending during peak wet weather flow conditions.

After seeking comment on the proposed policy and presumably making changes based on those comments, the Office of Water forwarded a final policy to the Office of Management and Budget (OMB) for review. NACWA and NRDC worked tirelessly with OMB and others in the administration to obtain a final policy that would provide additional clarity for the clean water community. The policy was never released by OMB, however, and was ultimately withdrawn along with other pending regulatory actions when President Obama took office.

Unfortunately, despite never receiving OMB approval, NACWA has learned that the proposed policy is now being implemented by the EPA Regions, and, furthermore, believes that this implementation is occurring in a manner inconsistent with NACWA's intent and the purpose of the negotiated agreement. NACWA understands that the Office of Water and the Office of Enforcement and Compliance Assurance at EPA Headquarters are directing the EPA Regions to implement the 2005 proposal as if it was final Agency policy.

We have been contacted by our members in Region 7, where regional staff, with direction from EPA Headquarters, are requiring utilities to develop the 'no feasible alternative' utility analysis contemplated by the proposed peak flows policy. Unfortunately, based on our understanding of the situation in Region 7, the proposed policy is being used in a manner inconsistent with what NACWA believes is the intent of the compromise approach it worked to develop. NACWA and NRDC underscored in an October 2006 letter to the Office of Water that a final peak flows policy would need to be accompanied by additional guidance in the form of fact sheets and a Q&A (questions and answers) document to further clarify the intent and applicability of the policy. It is now clear that the proposed policy is being implemented without gaining approval from the White House's budget office, without addressing the hundreds of public comments received on the 2005 draft, and without the benefit of this additional guidance that NACWA and NRDC believe is vital.

NACWA wrote then-Assistant Administrator for Water Benjamin Grumbles in December of 2008 requesting clarification of the Agency's position on blending, but to date we have not received a response to that inquiry. In subsequent discussions with Office of Water staff, however, we have been informed that the proposed policy is the Agency's 'latest thinking' on the practice of blending. It seems clear based on our discussions that the Office of Water intends to implement the proposal as though it were de facto final Agency policy. NACWA is very concerned that CWA permitting decisions are now being based on a proposed policy – with potentially massive financial consequences for municipalities – which the current Administration has not approved, clarified or finalized.

In addition to the inappropriate application of a proposed policy, NACWA believes the change in Administration signals the need to look at the issues related to sanitary sewer overflow (SSO) control in a more holistic manner. The blending policy represented a narrow effort to 'bite off' one component of what should have been addressed from the start via a comprehensive SSO rulemaking – a direction favored by the municipal, as well as the NGO, community.

NACWA has been urging the Agency to develop a comprehensive national policy for sanitary sewer systems, similar to what was done for combined sewers in the 1990s, which would address the issue of blending but, more importantly, the critical issues of overflows, peak excess flow treatment facilities, collection system management, and other issues. Development of such a broad-based policy was simply not viable in the previous administration. As a result, NACWA and NRDC entered into negotiations on the narrower issue of peak flow blending in order to at least move the ball forward on wet weather policy. It now appears that even this small step toward progress is at risk because of a failure to ensure it is appropriately implemented.

NACWA understands that the Office of Water may again be considering work on a comprehensive national policy for sanitary sewer systems, which could address overflows, blending, and other wet weather-related issues. NACWA welcomes a meaningful dialogue with EPA and other stakeholders on all the issues surrounding sanitary sewer system management. Until a comprehensive national policy can be developed, subjected to a full and open public comment process, and be issued as final with any necessary guidance,

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NACWA believes it is inappropriate to base CWA permitting decisions on a proposed policy and requests that you direct your staff at EPA Headquarters and the Regional Offices to discontinue using the policy for the purposes of issuing CWA permits immediately.

Please do not hesitate to contact me if you have any questions. I look forward to working with you and your staff on this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "K Kirk". The signature is stylized with a large "K" and a cursive "Kirk".

Ken Kirk

NACWA Executive Director

cc: Michael Shapiro, Acting Assistant Administrator, EPA/OW
Jim Hanlon, Director, Office of Wastewater Management, EPA/OW