NACWA
A Clear Commitment to America's Waters

August 13, 2009

Peter Silva
Assistant Administrator
Office of Water (4101M)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
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Via Facsimile

Dear Mr. Silva,

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the *Draft Guidance on Preparing a Utility Analysis* (*Draft Guidance*, July 2009). Though NACWA has asked its members to thoroughly review the *Draft Guidance*, this was done with the understanding that a final policy from the U.S. Environmental Protection Agency (EPA) Headquarters on the issue of blending and the application of the existing bypass regulations to diversions around the secondary treatment process would be issued before the Nation's wastewater utilities would be asked to conduct such analyses. NACWA believes it is inappropriate to issue guidance based on a new interpretation of the bypass regulations that has never been officially stated and, in turn, to use this guidance to implement a policy that has never been finalized. Unfortunately, now that the *Draft Guidance* has been widely circulated, though not officially opened for public comment, it will no doubt be used by states and EPA regions as the agency's 'latest thinking' on the subject.

As you will see in our comments below, the level of effort involved in conducting these analyses is not insignificant. In fact, the guidance acknowledges that most utilities will not have the expertise or resources in-house and will need to hire consultants to conduct the analyses. These costs are significant – as much as $250,000 for a moderately sized utility, with some estimates ranging from $500,000 to $1,000,000 for a single utility. NACWA strongly maintains that requiring these analyses and then imposing permit requirements to implement the feasible alternatives identified by the analyses cannot be "back-doored" through this guidance or through a new, undocumented interpretation of the existing bypass regulations. Public wastewater treatment utilities cannot commit extensive resources to conduct such comprehensive analyses and implement major capital

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programs based on language in draft guidance from EPA. The investments that EPA is asking these utilities to make will take many years to implement and there must be some assurance that the Agency will not simply change its mind and begin using a different interpretation of the existing regulations at some point in the future.

NACWA recognizes that reliance on diverting peak flows around secondary treatment units and recombining the flows prior to disinfection and discharge without any supplemental treatment, though legally defensible under the Clean Water Act and EPA's current regulations and capable of meeting all applicable discharge permit limits, is not a sustainable approach for many sanitary sewer system communities. As evidenced by our willingness, at EPA's request, to negotiate an agreement with the Natural Resources Defense Council (NRDC) on the issue of blending, the clean water community's top priority is protecting the environment. NACWA is interested in charting a path forward that is reasonable and protective of the environment, while also recognizing the importance of providing flexibility to the nation's clean water agencies. The current approach EPA is taking, implementing a massive new wet weather program that seeks to drive collection system upgrades and require every drop of wastewater to receive biological treatment, through a process that side-steps the Administrative Procedures Act (APA) via an extremely stringent re-interpretation and reversal of a decades-old regulation, simply is not appropriate or workable. EPA will remain on questionable legal ground if it continues to implement a proposed policy via draft guidance that imposes millions of dollars of costs on the Nation's municipalities. NACWA continues to believe that there is an opportunity to address collection system issues with a comprehensive national policy on sanitary sewer overflows, but to date EPA has been unwilling to confront that challenge head-on.

While NACWA appreciates that EPA shared with the Association the *Draft Guidance* for comment from its members and is seeking input from NRDC, the states and the EPA regional offices, NACWA believes that a more official comment period is needed. NACWA is aware that many state utility associations and individual utilities have developed comments on the *Draft Guidance* and the broader issue of the Agency's interpretation of the bypass regulation, and NACWA was not able to incorporate all of those comments here. These other perspectives must be considered before EPA takes any further action.

EPA Bypass Interpretation Inconsistent with Past Implementation, Secondary Treatment Regulations

As recently as 2003, it was EPA's position that not all in-plant diversions were considered bypasses. Permits issued and approved by EPA's regional offices have expressly acknowledged and authorized these diversions without applying the bypass regulation or requiring a no feasible alternatives analysis. No policy or regulation from EPA has changed the Agency's longstanding interpretation that these diversions can be permitted. Though the proposed 2005 peak flows policy contemplates the application of the bypass regulation to blending scenarios, that policy has never been finalized. In addition, EPA's new position that any diversions of flow not meeting secondary treatment standards (including scenarios where diverted flows are receiving extensive high-rate treatment) are bypasses, was not articulated in the 2005 proposed policy.

This new element of EPA's interpretation of the bypass regulation is a major concern for NACWA and its members. Peak flow treatment (e.g., ballasted flocculation, chemically enhanced primary treatment) has been

identified in numerous EPA guidance documents[1] as an effective means of handling peak flows and is specifically contemplated in the 2005 proposed policy as a feasible alternative, yet it appears in the *Draft Guidance* that EPA expects all of these technologies to be capable of meeting secondary treatment standards by themselves before recombining the flows. If they cannot meet these standards, EPA still considers these treatment enhancements to be a bypass. The application of secondary treatment standards to an individual process unit within the treatment plant is completely inconsistent with the intent of the secondary treatment regulations. In fact, the definition of percent removal (40 CFR 133.101(j)), a key component of the secondary treatment standards, indicates that the removal percentage is calculated "across the treatment plant", not an individual process unit, using raw wastewater pollutant concentrations and the effluent pollutant concentrations. The regulation applies to the treatment plant, not a treatment unit, and EPA is improperly applying the standards to individual unit processes in the *Draft Guidance*.

More troubling is that EPA's insistence that these auxiliary treatment units meet secondary standards or else be considered a bypass will likely eliminate this very effective means of dealing with peak flows. A number of communities have already installed peak flow treatment units in an effort to do the right thing and others are considering installing them. EPA must come up with a reasonable approach for addressing these existing installations outside of the bypass regulations. Unfortunately, as long as EPA considers these auxiliary treatment units a bypass, no utility will choose to install this additional treatment that benefits water quality and the environment. Utilities cannot knowingly risk using their ratepayer money to build what EPA considers an illegal process. Perhaps unintentionally, the environment will suffer as these communities who want to provide additional treatment will no longer be able to.

Collection System Issues Should Be Addressed Through Separate Federal Policy

Why is EPA insisting that these treatment units meet secondary treatment limits or be considered a bypass? NACWA believes there are two major factors here. First is the belief that biological treatment is somehow superior to physical/chemical treatment. Arguments have been made that without secondary treatment for all flows, solids remaining in the recombined flows may inhibit the effectiveness of disinfection. Data on the solids removal for non-biological auxiliary treatment demonstrates that this simply would not be an issue, with many technologies meeting or exceeding secondary standards for total suspended solids removal. The second issue is EPA's unfounded concern that utilities will simply install these auxiliary treatment units and ignore their collection systems. This is a completely different issue and needs to be part of broader policy discussions.

By creating disincentives to the installation of these technologies, EPA is clearly expressing its preference for making collection system improvements and reducing peak flows over providing improved treatment at the plant. This is clear in the case of one NACWA member that, even with a $15 million parallel treatment system coupled with more than $100 million in completed, ongoing and planned collection system improvements, has been told they are not doing enough and should install storage, eliminating the need for the $15 million treatment process. This community has drastically reduced its number of SSOs and continues to work on the collection system. Other communities are planning to build such systems, with similar or larger investments to

[1] For example, the EPA publication entitled "Wastewater Management Fact Sheet, In-Plant Wet Weather Peak Flow Management" supports the concept of using advanced primary treatment for diverted peak flows. This document was published by the EPA Office of Water in September of 2007 (EPA-F-07-016). On page four of this document, EPA discusses the use of Advanced Physical – Chemical Processes as a way to mitigate the impact of peak flows. EPA suggests that installing parallel treatment processes such as Chemically Enhanced Primary Treatment (CEPT) or Ballasted Flocculation as viable options for plants to handle peak flow volumes.

further improve the quality of their effluent during wet weather events – clearly a win for the environment – but EPA's current approach will remove this option from serious consideration by any utility.

If EPA wants to impose capacity, management, operation and maintenance (CMOM) requirements for collection systems, as is required on page 13 of the *Draft Guidance*, and force the utility to try to eliminate infiltration and inflow (I/I), then EPA should develop a comprehensive sanitary sewer overflow (SSO) rulemaking to do so, as it had intended to do in 2001. The *Draft Guidance* requires utilities to evaluate the "reductions obtainable through the development and implementation of a CMOM program and the related costs", which in all cases will likely be 'feasible,' leading the utility to develop a CMOM program before they can receive a permit. EPA previously believed that imposing CMOM requirements required a federal rulemaking process with full APA notice and comment requirements, but has now determined that it can be imposed without a formal rule and should be required before utilities can continue a practice for which their plants were built often with the support of federal construction grant funding. NACWA has been advocating for the development of a national policy or rule on sanitary sewer systems to include CMOM for more than a decade and would welcome a reinvigorated effort at EPA to do so. Trying to 'back-door' CMOM provisions through a new interpretation of the bypass regulations simply cannot work and could present significant legal complications for EPA in the future.

Again, NACWA is interested in charting a path forward that is reasonable and protective of the environment. While we feel it is important to thoroughly review and comment on the *Draft Guidance*, we provide the following comments with the understanding that a <u>final</u> policy from EPA Headquarters on the issue of blending and the application of the existing bypass regulations to diversions around the secondary treatment process will be issued before the nation's wastewater utilities would be asked to conduct such analyses.

General Comments on the *Draft Guidance*

- The utility analysis in the *Draft Guidance* ignores water quality and contains no acknowledgement that the analysis should consider the potential water quality benefits that might be realized by decreasing diversions. EPA only considers its desire to implement its stringent interpretation and does not consider whether there are better ways to invest a community's resources to address real water quality problems. For example, EPA's approach would effectively preclude the use of advance treatment technologies like membrane bioreactors to provide improved water quality year round, while relying on rare peak flow diversions during extreme wet weather events.

  The 2005 proposed policy states that "EPA recognizes that some POTW [publicly owned treatment works] treatment plants may be implementing technologies more advanced than or supplementary to secondary treatment. The Agency encourages the use and permitting of such technologies (e.g., membrane, tertiary) where they produce a higher quality effluent. In the case where a POTW treatment plant is using, or plans to use, technology that is more effective in baseline pollutant removal than is required to meet secondary treatment-based permit limits, the NPDES authority should take that improved baseline performance into consideration when determining whether peak flow diversions at a POTW treatment plant are approved and under what conditions." The *Draft Guidance* seems to contradict this earlier statement. Unless the utility is willing to accept a permit that includes an anticipated bypass provision, it's not clear how these advanced treatment processes that rely on diverting peak flows would be handled. The *Draft Guidance* also does not discuss how to address

wastewater treatment plants that are governed by water quality-based effluent limits above and beyond the secondary treatment requirements.

- The *Draft Guidance*'s Background section states that "The U.S. Environmental Protection Agency (EPA) interprets existing regulations, specifically, the *bypass* regulation at Title 40 of the *Code of Federal Regulations* (CFR) section 122.41(m), to apply in both circumstances [to diversions that are directly discharged or recombined]." EPA states this as fact, as if the Agency has previous articulated this interpretation. However, EPA provides no documentation on where this interpretation derives from, though it acknowledges that the 2005 proposed policy would have clarified this interpretation. Without a final policy clearly stating the Agency's new interpretation, the *Draft Guidance* is actually an interpretive regulation.

- Parallel or other treatment processes that perform auxiliary treatment of peak wet weather flows should not be considered a bypass. When a portion of the peak flow is diverted to a parallel treatment process, the plant's biological processes are still being utilized to its fullest extent. The biological treatment process is not being bypassed. Instead, the plant is merely utilizing an auxiliary treatment process to treat the excess peak flow, as is specifically contemplated by the bypass regulation (122.41(m)(4)(i)(B)). The plant recombined final effluent will be able to meet all the secondary treatment effluent requirements. Nowhere does the bypass regulation state that such auxiliary treatment would need to meet secondary treatment standards before recombination. EPA is asserting that such auxiliary treatment units would need to meet secondary treatment before recombination due to its preference that all flows receive biological treatment.

- If individual treatment units (e.g., ballasted flocculation) are required to meet secondary treatment standards to avoid the bypass determination, there is no incentive for a utility to provide peak flows with additional treatment. Though the utility would be providing treatment for all flows, a significant improvement over a simple diversion, their compliance status would remain the same as a facility that provides no treatment. EPA can use enforcement discretion, but the utility would be subject to citizen suits. No utility will be willing to commit millions of dollars to build a treatment unit that would result in the facility being in noncompliance. It seems the *Draft Guidance* should better account for its potentially harmful water quality impacts in severely restricting the use of these treatment technologies.

- The interpretation that diverted flow must meet the effluent limits in the secondary treatment regulations before mixing or recombination with other flows is in conflict with the 2005 proposed peak flows policy which requires compliance with the treatment plant effluent limits at the recombined final plant discharge not for the diverted flow before being recombined.

- In the second paragraph under Section V.e., the *Draft Guidance* states

> "Under the bypass regulation, a bypass occurs when there is intentional diversion of peak flows from the secondary treatment units, regardless of whether the diverted flows are treated. If the diverted flow is routed to a treatment unit that is itself a secondary treatment unit, it is not a bypass. The term *secondary treatment unit* refers to a treatment process that meets the effluent imitations in the secondary treatment regulations. See 40 CFR Part 133. If the diverted flows meet the effluent limits in the secondary treatment regulations before mixing or recombination

> with other flows, the routing scenario does not represent a bypass. The treatment unit(s) in that scenario would represent a parallel treatment facility. In contrast, in situations where flows are diverted around secondary treatment units and receive treatment that is not designed and demonstrated to meet limits based on the secondary treatment regulations, the diversion is a bypass."

This entire paragraph is problematic for a number of reasons. First, it includes the terminology "secondary treatment unit" in italics which would lead the reader to incorrectly believe it is a term defined in the regulations. "Secondary treatment unit" is not in the Part 133 regulations. It is also not in Part 122 or Part 124 or Part 125 or any NPDES regulations. It is a term that seems to have been created to better suit EPA's arguments that all flows must receive secondary treatment.

As written, the paragraph indicates the regulations treat "secondary treatment units" and "treatment units" the same as a "treatment facility." In reality, the regulations require the permitting authority to issue permits requiring the "treatment facility" to meet permit limits. The regulations further require the permitting authority to include effluent limits in the permit and that these limits be based on technology-based standards or water quality-based standards if the limits derived from technology-based standards are not stringent enough to meet water quality standards. The regulations are very clear. The regulations require the NPDES permitting authority to develop limits for all outfalls (40 CFR §122.45(a)) and include the applicable technology-based limits (40 CFR §122.44(a)). In this case the discharge is from a POTW. Therefore, the technology-based limits must be based on secondary treatment – see 40 CFR §125.3 and §133.102. The regulations, however, do not identify any specific "technology." The regulations require the permitting authority to set limits for the discharge <u>from the POTW based on</u> secondary treatment standards. The regulations do not require the permitting authority to establish limits for discharges from "secondary treatment units." The limits apply to the discharge from the whole POTW, not any individual part or treatment unit.

The regulations at 122.45(h) only allow limits for internal wastestreams when it is otherwise impractical or infeasible to set them for the point of discharge. In the case of the POTW and blended flows, it is not impractical or infeasible to set the limits at the point of discharge.

- Utilities need assurance that their substantial financial investments in construction of peak flow and/or parallel treatment facilities will not be deemed illegal when they seek to renew their permits. Communities planning to spend tens of millions of dollars to construct parallel treatment facilities to satisfy consent decree requirements will need to put in place significant sewer rate increases to raise or repay the needed capital funds. Ratepayers need assurances that their investment will not be rendered useless at the end of the first permit term. EPA's current approach will provide no such assurances.

- The evaluation of costs for feasible alternatives references the *Combined Sewer Overflow – Guidance for Financial Capability Assessment and Schedule Development* (EPA 1997). That guidance, however, is only useful in determining projected burdens to a community and in setting an appropriate schedule for completing a project. It assumes that all projects are feasible given enough time. This was in no way NACWA's intent when it explored the use of the "no feasible alternatives" concept in its negotiations with NRDC.

In addition, as NACWA has pointed out to EPA for several years, the 1997 guidance does not fully capture the full range of financial impacts on a utility or impacts on citizens and NACWA has been supporting legislation that would require EPA to revise its affordability guidance to take a broader look, beyond simple measures such as median household income. It is important to consider (1) the full range of water quality demands and costs on ratepayers; and (2) whether the alternatives called for are the least costly way to address any water quality problems that the region faces.

The *Draft Guidance* states that the permittee must make a "showing that implementing additional controls would create a high financial impact or are otherwise infeasible." While this very general language may be appropriate given that financial impacts are case by case determinations, it provides no information on what a 'high financial impact' may be and allows for a very wide range of discretion for the permitting authority.

- The proposed 2005 peak flows policy doesn't apply to combined systems, so the discussion of CSO communities and how the *Draft Guidance* may apply is causing significant confusion. NACWA believes that all references to combined systems should be removed from the document, except to indicate that the 2005 proposed policy and the *Draft Guidance* do not apply to combined sewer systems. The CSO Control Policy is, itself, adequate to address the issue of feasible alternatives in long-term control plans.

- The *Draft Guidance* should provide a streamlined process for conducting the utility analysis during subsequent permit cycles. Consistent with the 2005 proposed peak flows policy, the *Draft Guidance* provides that at the time of application for a Clean Water Act permit for treatment plants seeking approval of peak wet weather diversions at a treatment plant as an anticipated bypass, the plant should submit a utility analysis to the permitting authority. The utility analysis will be costly to perform and much of the information in the utility analysis will not change during a five year permit cycle. In fact, much of the work identified in the initial analysis will still be underway when the permit comes up for renewal. The *Draft Guidance* should provide a streamlined process allowing the POTW to simply update the portions of the utility analysis that have changed when the utility submits an application for renewal of its permit.

  EPA should consider the approach it used in the reapplication process for Phase I MS4 permits. EPA published its *Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems* in the August 9, 1996 *Federal Register*. EPA does not require the process used for part 1 and 2 of the initial MS4 permit application to be repeated in full. EPA identified basic information that should be included in the reapplication along with any proposed changes or improvements to the storm water management program and monitoring activities. A similar approach should be outlined in the *Draft Guidance* for updating the utility analysis in subsequent permit cycles.

- EPA must address the issues presented by the increased use of biological nutrient removal (BNR) at the nation's POTWs in its discussions on peak wet weather flows. Many BNR installations are integrated with the secondary treatment process and increase the sensitivity of the secondary treatment process to the impacts of peak flows. The increased use of BNR nationwide will only increase the need for diverting flows from biological secondary treatment units.

- For states with facilities planning requirements, the *Draft Guidance* should recognize facilities plan approvals to be equivalent to a utility analysis.

- The *Draft Guidance* needs a definition section to include a definition of 'diversion', which is used interchangeably with 'bypass' throughout the document.

Specific Comments on the *Draft Guidance*

- Section II.c. – The requirement to review piping and pumping capacity delves into extraordinary levels of detail and cost and seems unwarranted.

- Section II.d. – This section calls for documentation of maximum flow capacity, however it discusses this analysis and "stress tests" in the abstract and does not ask the other part of the question - how long can the plant function at this theoretical maximum? The reason, in many cases, blending is employed is because the biological system is being protected and managed so that it will be able to continue to achieve the best treatment and will be available for the next rain event. Any analysis needs to be put into the context of a dynamic biological treatment process which needs to be rigorous enough to account for changing stresses and potentially multiple storms in succession.

- Section III – The requirement to analyze how rain events relate to diversions may not be straightforward for some regions of the country. In wetter areas, there is not a clearly defined alignment or correlation between size or duration of rainfall and blending event initiation or duration.

- Section III.b. – Requires detailed information "for any process bypass that has occurred at the plant." NACWA believes this should be restricted to a specific time period, such as in the past three or five years, as is stated under Section III.e. for reporting of SSOs. It is unreasonable to assume that agencies will have data for bypasses occurring several decades ago.

- Section III.c – What does EPA consider to be "high levels of I/I." EPA guidelines and regulations call for the use of cost-effectiveness to determine excessive I/I. The *Draft Guidance* should specify what EPA intends.

- Section II.e. – EPA should request that utilities provide a description of the unique governance challenges they face in addressing flow-related issues in the satellite collection systems not owned or operated by the treatment authority. The *Draft Guidance* states that utilities should evaluate "options for obtaining or expanding legal authorities to reduce I/I from satellite collection systems." This is simply not as easy as EPA implies. In many cases representatives from the satellite jurisdictions sit on the board for the regional authority and imposing controls from the authority on the satellites is extremely complicated and in some cases restricted by the authorizing legislation that created the regional authority. These are issues that must be addressed through a comprehensive, national SSO policy, not a guidance document.

- Section III.e. – The document should clarify whether regional agencies are expected to report information on SSOs occurring in satellite systems. Any information on SSOs occurring in satellite

systems would be based solely on information provided by those agencies. Therefore, it seems unreasonable to request this reporting from a regional agency.

- As mentioned above, Section III.f. essentially imposes CMOM requirements on any community without an existing program. Previously, EPA felt it needed a formal rulemaking to impose such CMOM requirements. In addition, since EPA has not defined what constitutes CMOM.

- Section IV - Requirement to "provide estimates of future peak wet-weather flows" should be clarified to state what time period the analysis should consider so that agencies have a target for the required growth projections, water use trends, etc. This is particularly important for projections of "predicted climatic conditions." Are agencies to consider near-term changes such as El Nino effects or long-term changes such as global warming and sea level rise? In either case, projections of climatic impacts on frequency, duration, and volume of bypasses will be very difficult.

  The entire document would benefit from a discussion of storm size and how utilities are supposed to project peak wet-weather flows or characterize current peak flows or promote "use of measures to provide the highest possible treatment to the greatest possible peak wet-weather flow." EPA continues to avoid the design-storm concept, but the analyses contemplated by the *Draft Guidance* will be impossible without addressing storm size and intensity.

- Section V needs additional clarity. Does the utility analysis need to include descriptions of all alternatives, or just feasible alternatives? Parts of the section discuss including an evaluation of a particular option, such as sewer moratoria, but other parts discuss including a discussion if a particular approach is feasible. In other sections, the document "recommends" what a plant should have, but does not indicate what the utility analysis should discuss. The guidance seems to describe a planning process more than an analysis. For instance, it contains a section on proposed measures for implementation (VIII), and detailed information on financing. It may be difficult to commit to implementing changes in an analysis document, except those that are already articulated elsewhere.

  The Draft Guidance should also clarify whether all of the operations practices (Section V.a.) need to be addressed in the analysis, or whether those listed are only examples. Similarly, do all options discussed in Sections V.b. and V.c. need to be addressed in the analysis.

  The first line of Section V indicates that the analysis should "identify and evaluate a comprehensive set of potential alternatives." NACWA believes this language is inappropriate as it will provide the permit writer with almost unlimited discretion to require more information and additional level of effort from the utility.

- Section V - Potential Measures

  - Buffer Capacity - The suggestion that utilities should define and use in some way a buffer capacity of 5-10 % of their design capacity is vague and confusing. Is this suggesting that the plant should leave un-utilized, a portion of the plant rather than using it for treatment? And for how long – the whole wet season? NACWA believes that a more logical approach would be for a utility to bring

units in service as needed and not purposefully try to keep some capacity in reserve for a future flow that may not happen.

- Tank for Storage of Biomass – The *Draft Guidance* does not discuss that the biomass would have to be aerated, particularly for longer events. Additionally, during storage, the biomass will not be inactive, it will change characteristics as the sludge micro-organisms will continue to try to survive in the absence of additional organic matter. An example of the successful use of this technique would be helpful.
- Reduced RAS Rate; Increased Chemical Feed; Step feed – These are all appropriate process optimization steps, but they require time to implement effectively and storms are unpredictable and in some parts of the country, come in rapid succession. Again these suggestions do not seem to acknowledge that the plant processes are dependent on conditions over a longer timeframe than compartmentalized rain events.

- Section V.c. – Reduction of I/I is an objective of any CMOM program, but the extent to which I/I can be reduced to eliminate peak flows is questionable. Studies of I/I reduction show varying levels of success. One case study from Illinois that was recently presented at WEFTEC describes the results of an aggressive I/I reduction program. In a service areas with only 188 connections, $1,500,000 or approximately $8,000 per connection was spent, not including engineering costs. One hundred percent of sewer mains and manholes were rehabilitated, and 96 percent of services were rehabilitated and passed air testing. However, only 42 percent I/I reduction was achieved. I/I will also increase again as rehabilitated project elements deteriorate over time.

- In its discussion of providing secondary treatment to diverted flows, EPA again makes clear that it is not interested in relying on auxiliary treatment as a long-term solution. EPA only mentions a few technologies that it would be satisfied with, including membrane bioreactors, one of the most advanced treatment processes available. EPA then notes that the technology is flow dependent, only capable of handling peaking factors of 2 and "expensive" – making this option likely infeasible for every community. Unfortunately, where utilities are interested in using membrane bioreactors to provide advanced treatment for all flows, EPA's policy regarding peak flow diversions will act as a disincentive. In fact, EPA has already denied the construction of a membrane bioreactor plant because that plant would need to divert peak flows around the bioreactors only a handful of occasions throughout the year.

- The *Draft Guidance* should clearly state that some physical chemical treatment and ballasted flocculation systems are capable of meeting the regulatory definition of secondary treatment. Clear acknowledgement that physical chemical treatment and ballasted flocculation can provide secondary treatment in some applications should be included in the *Draft Guidance*. EPA also needs to address how it plans to apply 30-day average requirements for secondary treatment to a unit process that only runs a few hours each month.

- NACWA agrees that public participation is an important element of any effort that has major cost implications for a community. NACWA understands that involving the public, as is recommended by the *Draft Guidance*, can have an impact on the "no feasible alternatives" determination. The community

should have input into the final selection of feasible alternatives after a full presentation of the cost and environmental implications of each of the options.

- Section IX – The monitoring provisions should allow for the monitoring of an approved surrogate where appropriate.

- The *Draft Guidance* does not include a "disclaimer" that explains that it is only "guidance." This is a very simple omission that can cause serious problems. This guidance should not have been released without a disclaimer because, as was state above, it is likely to now be used by states and regions. In addition, the *Draft Guidance* contains significant typographical errors.

NACWA appreciates the opportunity to comment on the *Draft Guidance*. Again, we offer these comments with the understanding that a final policy statement from EPA Headquarters on the issue of blending and the application of the existing bypass regulations to diversions around the secondary treatment process will be issued before the nation's wastewater utilities will be asked to conduct such analyses.

Sincerely,

Ken Kirk
Executive Director

cc: Jim Hanlon, Director, Office of Wastewater Management