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September 9, 2009

Assistant Administrator Peter Silva

U.S. Environmental Protection Agency Office of Water

Ariel Rios Building

1200 Pennsylvania Ave., NW (4101M)

Washington, DC 20460

Dear Assistant Administrator Silva:

Thank you for agreeing to meet with the National Association of Clean Water Agencies (NACWA) this week to discuss the priority concerns of the nation's public clean water agencies. We are very pleased to welcome you to the U.S. Environmental Protection Agency (EPA) and we look forward to a productive dialogue with you and your staff on the many pressing water quality issues that communities across the country are grappling with.

NACWA is the leading advocacy organization representing approximately 300 publicly owned wastewater treatment agencies across the nation. NACWA's membership collectively treats and reclaims over 18 billion gallons of wastewater per day and includes utilities of all sizes. As leading environmental stewards, NACWA members work each day to ensure that the significant water quality improvements made in the decades since the passage of the Clean Water Act are not squandered.

There are several priority issues that NACWA would like to discuss with you further and will be the subject of detailed communications between us and your office going forward. As you know, communities are facing serious financial and affordability concerns as a result of the economic downturn. This financial reality must serve as a sober background to any serious policy discussions, including those in this letter. We also know how hard the Office of Water is working to implement the stimulus package and want to extend our appreciation to the Administration and your staff for this effort and to ensure it serves as a successful precedent for future federal-state-local partnerships as well.

The issues of funding and financing, however, while critical, are not the primary issues we wish to raise with you. This letter only touches on a handful of priority, time-sensitive issues and should not diminish the vital importance of the broad

range of challenges NACWA's members face. Some of these challenges include climate change, the implementation of green infrastructure solutions, sound affordability guidance, and addressing our deep concerns about EPA enforcement priorities. All of these challenges will require additional investment from all levels of government and NACWA continues to maintain that the federal government must be a partner in putting more money on the table, including through a national water trust fund — an issue that is receiving significant congressional attention.

This letter, however, does not serve as a laundry list of municipal clean water concerns; instead, it briefly discusses five key issue areas that NACWA maintains are at the core of current and emerging challenges for the municipal community and demand continued NACWA-EPA collaboration:

- 1) nutrient control;
- 2) peak excess flow “blending”;
- 3) biosolids with a focus on incineration issues;
- 4) jurisdiction over wastewater and water chemical security issues; and
- 5) the pressing need to move toward a watershed approach.

Because this brief letter cannot do justice to any one of these issues, let alone all of them, NACWA strongly urges you to consider holding a monthly meeting with key representatives from national municipal organizations, including NACWA, on water sector issues — similar to the industry “coffees” that your office has traditionally participated in.

The municipal voice is just as vital as that of the industrial sector and, while NACWA and other key municipal organizations have been holding regular and productive meetings with the Office of Wastewater Management, NACWA believes a broader clean water/drinking water/stormwater issues meeting with you would send a strong signal that water issues must be addressed holistically and that the vital federal-municipal partnership will play a key role in addressing 21st century water quality and quantity challenges.

Nutrient Control

NACWA recently shared with your staff our August 9 *Nutrients Issue Paper — Technical Discussion* that sets out the clean water community's views on nutrients and addresses many of the recommendations set out in the Natural Resources Defense Council's (NRDC) *Petition for Rulemaking Regarding Modification of 40 CFR Part 133 (Federal Definition of Secondary Treatment) to Include Nutrient Reduction Requirements for Nitrogen and Phosphorus*.

As the NACWA paper sets out in greater detail, it is critical that EPA fully recognize that wastewater utilities are often a very small and even negligible part of nutrient pollution in many watersheds. While NACWA fully understands that wastewater utilities, where it makes sense on a site-specific basis, must play a key role in nutrient control, the application of treatment technology standards for nutrients will not ensure that water quality benefits will result.

Nutrient-driven water quality impairment is complex and loadings vary significantly from watershed to watershed across the country. Thresholds for nutrient enrichment vary, as does the magnitude of point and non-point source loadings, and waterbody responses. For these reasons, a treatment technology standard appropriate in one location may be overly restrictive in another, or not protective enough in a more sensitive watershed. The implications of such an approach would deeply impact NACWA's members and should EPA accept NRDC's petition, the Association would have to seriously consider all its options, including litigation.

The real solution is to address non-point sources of nutrient pollution, including agriculture and stormwater runoff. NACWA strongly recommends that EPA as well as other key agencies within the Administration, including the U.S. Department of Agriculture, take serious steps to develop a system whereby the primary causes of nutrient pollution to a waterbody/watershed are assessed and targeted for reduction. NACWA does not believe that simply ratcheting down on public clean water agencies is a viable approach. This would only result in scarce resources being ill-spent and water quality continuing to deteriorate. NACWA also urges EPA to take into account climate change in all its regulatory endeavors, but especially in the context of nutrient removal. Nutrient removal is an energy-intensive activity that will create a significantly larger municipal carbon footprint — an outcome that can only be rationalized if it leads to significantly improved water quality.

Peak Excess Flow Blending

In line with our August 13, 2009 comments to you and your staff on EPA's recently released *Draft Guidance on Preparing a Utility Analysis* (July 2009), the Association re-emphasizes that the Agency's current peak excess flow blending policy posture would, perhaps unintentionally, punish those public clean water agencies that have sought to make the investment to treat peak excess flows and improve water quality.

As this letter points out, NACWA believes that the *Draft Guidance* and EPA's position that peak excess flow blending is illegal pursuant to the bypass regulations is not supportable. There has been no final policy from EPA Headquarters on the issue of blending as a prohibited practice under the existing bypass regulations.

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. There is already significant disparity in EPA regional and state approaches on blending and this *Draft Guidance* will only exacerbate this problem.

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 does, however, recognize 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 in full compliance with applicable discharge permit limits — is not a sustainable approach for many sanitary sewer system communities. This view is evidenced by NACWA's willingness, at EPA's request, to negotiate an agreement with NRDC on the issue of blending.

NACWA is interested in charting a path forward that is reasonable, protective of the environment, and recognizes the importance of providing flexibility to the nation's clean water agencies. ***Significantly, NACWA continues to believe that there is a unique opportunity to address collection system issues with a comprehensive national policy on sanitary sewer overflows (SSOs). This would be the best path forward to deal with the broad range of SSO issues, including monitoring and notification of SSOs, collection system upgrades, and also peak excess flow blending.*** NACWA hopes this will become a priority for the Office of Water and that EPA staff can be allocated to work on such a policy with key stakeholders, including NACWA.

Biosolids/Incineration Issues

NACWA has always appreciated the strong working relationship we have had with EPA in ensuring municipal flexibility in deciding a community's appropriate biosolids management techniques, so long as they are in full compliance with the stringent Part 503 regulations. We look forward to continuing to work with you to preserve this municipal flexibility but believe this could be threatened as the Agency's Office of Resource Conservation and Recovery (ORCR, formerly the Office of Solid Waste) seeks to propose a definition of solid waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA) that includes biosolids.

NACWA has been working on multiple fronts to determine the extent of the impacts that such a re-definition of solid waste might have on biosolids management and to persuade EPA to explore other options. Specifically, the ORCR rulemaking was initiated to determine how sewage sludge incinerators (SSIs) should be regulated under the Clean Air Act (CAA), but an EPA regulation stating that biosolids are solid wastes could have broader consequences, including impacts on land application.

The most significant and direct impact of EPA's definition, however, will be the required air emission controls for SSIs. EPA's clean air office intends to regulate all solid waste incinerators under the more onerous Section 129 requirements and in response to ORCR's preliminary determination that biosolids that are incinerated are solid wastes, the EPA Office of Air and Radiation is proceeding with a separate rulemaking to develop stringent CAA standards for SSIs.

NACWA has long held that SSIs are more appropriately regulated under Section 112 of the CAA as area sources and had been assisting EPA in the development of those regulations when a 2007 D.C. Circuit Court ruling called into question EPA's justification for regulating certain incinerators, not SSIs, under Section 112 instead of Section 129. Though EPA had decided earlier in 2007 to regulate SSIs under Section 112, the Agency determined that its reasoning needed to be reviewed as a result of the 2007 court ruling.

Based on ORCR's preliminary determination that SSIs are burning solid waste, EPA is now working to develop maximum achievable control technology (MACT) standards (under Section 129) for SSIs by October 15. EPA, meanwhile, is under a court-ordered deadline to propose the new definition of solid waste by September 15, but NACWA has learned that ORCR may ask for more time to work on its definition.

Simply stated, NACWA would appreciate your help in weighing in with the Assistant Administrators (AAs) of OSWER and the Air Office and expressing to them that the Part 503 regulations remain the best method to ensure that biosolids management is protective of public health and the environment and that biosolids should, as it has been to date, not be considered a solid waste. Furthermore, even if biosolids are determined to be a solid waste as a threshold matter, as a regulatory matter the Part 503 regulations can still maintain

regulatory primacy. NACWA will be sending you and the AAs for the Air Office and ODWER a detailed legal/regulatory analysis of this issue and we look forward to working with you to address our concerns regarding biosolids going forward.

EPA Jurisdiction over Water, Wastewater Security

With Congress back from its August recess, the issue of water and wastewater security is again moving forward. As you may know, [The Chemical Facility Antiterrorism Act of 2009](#) (H.R. 2868), which would reauthorize the Department of Homeland Security's (DHS) Chemical Facility Anti-Terrorism Standards (CFATS) program, was approved by the House Homeland Security Committee in June and directs that jurisdiction over security of wastewater treatment facilities fall under the DHS. Meanwhile, the [Drinking Water System Security Act of 2009](#) (H.R. 3258), introduced by the Energy & Commerce Committee Chairman Henry Waxman (D-Calif.), places the protection of drinking water facilities within the jurisdiction of EPA.

Clearly, this is an unworkable situation — one need not look beyond the complexity of having joint water-wastewater facilities put in the untenable position of having half of their operations overseen by DHS and half by EPA. NACWA's position throughout these discussions has been that EPA has the long-standing expertise in water-wastewater security issues, having taken the lead on this issue since the tragic events of 9-11-2001. This long-standing EPA primacy, coupled with the Agency's jurisdiction over Clean Water Act issues more broadly, also led the House Transportation & Infrastructure Committee to weigh in on this jurisdictional issue and introduce the [Wastewater Treatment Works Security Act of 2009](#) (H.R. 2883). H.R. 2883 would house jurisdiction for wastewater security at EPA and establish a wastewater security program at the Agency.

Although it is unlikely that the Senate will take up the issue until next year, it is critical that EPA, and the Office of Water specifically, weigh in with the Administration in favor of keeping jurisdiction for water and wastewater security at EPA in order to clear up the jurisdictional confusion that Congress has created. The Administration, in turn, should be urged to contact the key Congressional Committees of jurisdiction to work together to solve this problem. If there is any additional information EPA may need in this regard, NACWA would be pleased to provide any assistance it can.

The Watershed Approach: Solving 21st Century Water Challenges

Up until now, clean water agencies, and point sources more broadly, have led the charge to ensure the water quality progress we have enjoyed over the past several decades. This progress, however, has reached a plateau yet approximately 40% of our waterbodies remain impaired. The only way to get to the next level of water quality progress is by addressing the full range of contributors to water impairment, especially nonpoint sources who for too long have been given a free pass. NACWA was pleased that Administrator Jackson discussed this challenge at our *National Clean Water Policy Forum* in May and recognized the need for a watershed approach in her remarks.

Furthermore, only a watershed approach can put scarce resources toward the highest priority pollution problem to remedy it. NACWA's public agencies would be willing to partner with agricultural interests and invest in upstream agricultural fixes if that constituted the most cost-effective method to address an impaired waterbody but there is little federal policy support to bring these interests around one table to develop such solutions.

Only through a viable watershed approach can we begin to view water holisitically — whether it is wastewater, drinking water, or stormwater, and to focus some resources on the highest priority pollution problems. The nation must begin to move toward full water reuse and recycling to address the challenge of a rapidly growing population. Green infrastructure and low-impact development techniques that could help solve water quality, water quantity, and air quality concerns would have the best chance of success if issues were looked at from an integrated watershed perspective. The climate-driven policies of the future will also demand a careful review of our entire regulatory structure that was created without much consideration of energy needs or use and a carefully constructed watershed strategy could incorporate these concerns effectively.

NACWA has been a strong advocate on behalf of a new watershed approach and has been working with key NGOs to craft legislation that will both preserve the critical functions of the Clean Water Act while also building on them through a broader, integrated approach that brings all key stakeholders in a watershed to the table to address priority pollution challenges. NACWA hopes to have this legislation introduced early next year and will be sharing it with your office soon. We would appreciate any feedback you may have on how to ensure the Administration's support for this bill and its ultimate success.

Please accept my thanks on behalf of the NACWA membership for meeting with us to discuss these priority issues for the clean water community. We look forward to working with you and your staff during these challenging times. It is vitally important that we work closely together and continue to strengthen the federal-state-local partnership that can ensure continued water quality gains for future generations. We look forward to meeting with you on a regular basis and to continuing this important discussion.

Sincerely,

A handwritten signature in black ink, appearing to read "K Kirk". The signature is fluid and cursive, with the first letter "K" being large and prominent.

Ken Kirk
Executive Director
NACWA