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Ken Kirk

March 24, 2010

Cynthia Giles

Assistant Administrator, U.S. Environmental Protection Agency

Office of Enforcement and Compliance Assurance

1200 Pennsylvania Avenue, NW

Mail Code 2201A

Washington, DC 20460

Dear Assistant Administrator Giles:

I write on behalf of the National Association of Clean Water Agencies (NACWA) in response to the National Enforcement Initiatives for fiscal years 2010-2013 announced last month by the U.S. Environmental Protection Agency's (EPA's) Office of Enforcement and Compliance Assurance (OECA). NACWA represents nearly 300 publicly owned clean water utilities and stormwater utilities located across the country that are committed to improving our nation's waters and achieving the goals of the Clean Water Act. NACWA submitted both oral and written comments to OECA in December 2009 during the development of the FY 2010-2013 enforcement initiatives. The final list published in February 2010 includes municipal wet weather infrastructure issues such as combined sewer overflows (CSOs), sanitary sewer overflows (SSOs), and stormwater overflows as one of the six enforcement initiatives for the next three years. Given the importance of enforcement issues to NACWA members, we have some comments and concerns about how OECA has framed this enforcement initiative.

NACWA was very pleased to see that the 2010-2013 enforcement initiative for municipal wet weather overflows contained a commitment from OECA to focus on "affordable solutions" to these infrastructure challenges. This is the first time EPA's enforcement priorities/initiatives for municipal wet weather infrastructure has referenced affordability and NACWA is hopeful this marks the start of a change in EPA's thinking on this critical issue. The new language suggests EPA has correctly recognized, especially in light of the current economic downturn, that there comes a point where affordability issues in enforcement decrees cause both municipal budgets and utility ratepayers to reach the breaking point. However, we are concerned that the enforcement initiative does not more clearly define what an "affordable solution" might be or how the concept of affordability might be defined in pursuit of this initiative. Such a determination is crucial to understanding whether this new language represents a break from past precedent or whether EPA plans to continue its reliance on outdated affordability guidance.



NACWA has long argued that EPA's 1997 affordability guidance document, which forms the basis for the Agency's current views on what communities can afford, is in need of substantial changes and updates. Most recently, NACWA made this point in our December 2009 clean water enforcement white paper, arguing that revisions to the affordability guidance are long overdue. It is not reasonable to assume, as EPA currently does, that communities can afford to pay 2 percent of their median household income to combined sewer overflow control while the enforcement office then steps in and mandates additional controls for sanitary sewer overflows, total maximum daily loads, stormwater control, nutrient control, emerging contaminants, climate change mitigation and adaptation, and the many other environmental concerns municipalities must contend with in addition to other local priorities (education, hospitals, police and law enforcement, etc.). Acknowledging the importance of "affordable solutions" in municipal wet weather enforcement is a step in the right direction, but it is only a first step. EPA must also work on updating its outdated affordability guidance and look at the issue a more broad and holistic manner.

NACWA was also pleased that the planned enforcement initiative promised "increased use of green infrastructure and other innovative approaches" as part of future enforcement efforts. As one of the original signatories with EPA to the 2007 *Green Infrastructure Statement of Intent*, NACWA is a strong supporter of green solutions to wet weather issues and believes low impact development techniques can both improve water quality and enhance the livability of our communities. Unfortunately, the current clean water regulatory and enforcement structure has impeded the use of green solution and discouraged their use as a key element to solving municipal sewer overflow and stormwater concerns. Those utilities with an interest in green solutions to their wet weather issues have been told that while green infrastructure can be used as an "add on" component of their consent decrees, it cannot take the place of traditional gray infrastructure projects like deep tunnels and retention basins. Furthermore, no municipalities have yet been able to obtain any significant regulatory credit or acknowledgement for their proposed use of green techniques. If green infrastructure is to move from the periphery of municipal wet weather solutions to a more central role in addressing wet weather flows, EPA must be willing to accept and encourage green projects as a center piece of enforcement efforts and consent decrees instead of the gray infrastructure projects that have historically been required. EPA must also develop ways to provide regulatory credit for the use of green infrastructure, further incentivizing communities to take advantage of green infrastructure's full spectrum of environmental, economic, and social benefits. In order for EPA's commitment in the initiative to support green infrastructure solutions to become a reality, the Agency must explain in more detail terms how it plans to accomplish this important goal.

NACWA requests a meeting with you and your staff to further discuss how EPA plans to incorporate the issues of affordability and green infrastructure into the municipal wet weather enforcement initiative. NACWA has a valuable perspective on these important topics and believes that both our membership and EPA will benefit from continued dialogue on this issue.

Thank you for this opportunity for NACWA to provide our thoughts on the municipal wet weather national enforcement initiative. If you have any additional questions or concerns, please do not hesitate to contact Keith Jones, NACWA's General Counsel, at 202/533-1803 or kjones@nacwa.org. We look forward to hearing from you.

Sincerely,



Ken Kirk
Executive Director

Cc: Peter Silva
Mark Pollins