NACWA
A Clear Commitment to America's Waters

June 9, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue NW
Mail Code 1101A
Washington, DC 20460

Dear Administrator McCarthy:

I write this letter on behalf of the nearly 300 public clean water utility members of the National Association of Clean Water Agencies (NACWA) to express concern about recent developments involving application of the U.S. Environmental Protection Agency's (EPA's) 1994 *Combined Sewer Overflow (CSO) Control Policy*. NACWA played a central role in negotiations leading to the final *CSO Policy*, and our members have been at the forefront of effectively implementing the *Policy* over the past 20 years. Due to recent activity related to implementation of the *Policy*, we request a reaffirmation from EPA that the Agency and its Regional offices will continue to honor the *Policy* and its directives, including its language on cost considerations.

The *CSO Policy's* publication in 1994, and its subsequent codification into the Clean Water Act (CWA), marked a major milestone for EPA, the states, and the municipal clean water community in setting clear benchmarks and guidance for CSO abatement programs. In particular, the *Policy* provided a regulatory and legal foundation for communities across the country to develop long term control plans (LTCPs) that met the goals of the CWA while also ensuring CSO investments were made in a cost-effective manner. It has served as an excellent example over the past two decades of how EPA, the regulated community, and other key stakeholders can come together and develop a rational approach to clean water improvement that acknowledges both environmental and economic concerns.

However, NACWA has become aware of a concerning development involving at least one EPA Regional office that has expressed a position inconsistent with the *CSO Policy*. In connection with an LTCP submitted by New York City, EPA Region 2 has advanced a position that ignores the specific "knee of the curve" language in the *CSO Policy* regarding the cost/performance considerations to be used in evaluating potential CSO control measures. Instead, the Region has taken the position that an LTCP must be designed to achieve the "highest attainable use" in order to be approved. In contrast to the emphasis on cost-effectiveness in the *CSO Policy,* the Region's position suggests that the economic basis of attainability would be the "substantial and widespread economic and social impact" standard that is generally

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required in changing water quality standards (WQS) via a use attainability analysis (UAA). The Region's letter, a copy of which is attached, was sent to the New York State Department of Environmental Conservation shortly after that agency had disapproved a proposed LTCP that would have met the existing WQS, where the utility was not seeking to lower a designated use.

NACWA believes the position advanced by Region 2 is completely inconsistent with the *CSO Policy* and sets a much higher bar for both cost analysis and performance than was ever intended by the *Policy*. This new interpretation ignores the clear "knee of the curve" cost/performance consideration outlined by the *Policy* as the appropriate cost analysis, and instead arbitrarily substitutes a higher analysis reserved for the UAA process. This interpretation creates a false and unauthorized requirement that all LTCPs must be designed to achieve a higher designated use than could be attained when applying the *Policy's* "knee of the curve" analysis.

In short, this new interpretation completely contradicts the clear language and intent of the *CSO Policy*. It represents a violation of the *Policy* and, by incorporation, the CWA itself. NACWA has significant concerns about the position taken by Region 2 in this matter, not only for New York City but also for the national municipal clean water community more broadly. If other Regional offices and/or states start taking similar positions, it will lead to immediate and significant economic harm for clean water utilities across the nation. While NACWA recognizes there may be other technical issues with the particular LTCP that likely prompted Region 2's letter, the apparently new economic standard that the Region is advancing has national implications, and has prompted NACWA to reach out to EPA Headquarters.

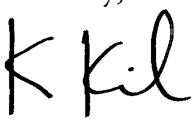
NACWA, therefore, requests that EPA unequivocally reaffirm in writing its commitment to the 1994 *CSO Policy*, including its language on use of a "knee of the curve" cost/performance analysis when evaluating appropriate cost expenditures for CSO LTCPs. NACWA also requests EPA reaffirm that the applicable water quality benchmark for LTCP approvability is existing WQS, and that the *Policy* does not require LTCPs to achieve the "highest attainable use," which would rely on the UAA economic harm standard.

EPA has made significant strides in recent years to acknowledge the significant financial pressures facing municipal clean water utilities and their communities with regard to wet weather expenditures, and to create a smarter and more flexible solution to address these concerns. EPA's 2012 Integrated Planning Framework and the recent discussions on affordability are two examples of this more positive approach.

Unfortunately, the more recent developments involving the *CSO Policy* outlined in this letter are at odds with the otherwise constructive actions EPA has taken on wet weather issues. Clean water utilities and EPA have collaborated in recent years to champion sustainable actions and expenditures that yield the greatest environmental benefits -- we urge EPA to not allow this progress to be undermined. NACWA looks forward to working with EPA as quickly as possible to address these concerns and clarify the Agency's ongoing commitment to flexibility and smarter investment for our nation's wet weather programs.

If you have any questions or would like to discuss these issues further, please do not hesitate to contact me.

Sincerely,



Ken Kirk
Executive Director

CC: Bob Perciasepe, Deputy Administrator
Nancy Stoner, Office of Water
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Deborah Nagle, Office of Water
Mark Pollins, Office of Enforcement and Compliance Assurance

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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FEB 14 2014

Mr. James Tierney, Assistant Commissioner
Water and Watersheds
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-3500

Re: **New York City CSO Long Term Control Plans and Water Quality Standards**

Dear Mr. Tierney:

As you know, the U.S. Environmental Protection Agency (EPA) is committed to improving water quality in communities impacted by combined sewer overflows (CSOs) and strongly supports the New York State Department of Environmental Conservation (NYSDEC) in its efforts to ensure that the New York City Department of Environmental Protection (NYCDEP) is taking necessary steps to implement the EPA's *1994 CSO Control Policy* to meet appropriate water quality standards. Specifically, we want to reiterate the U.S. Environmental Protection Agency's (EPA) position regarding the applicable water quality standards, including the designated uses and criteria to protect those uses that should be used as the basis for long term control plan (LTCP) design.

The 1994 CSO Control Policy states that water quality standards authorities should work to ensure that the development of the CSO permittees' LTCPs are coordinated with the review and possible revision of water quality standards on CSO-impacted waters. Further, permittees with CSOs are responsible for developing and implementing LTCPs that will ultimately result in compliance with the requirements of the CWA. EPA supports NYSDEC's position that, wherever possible, the LTCP should be developed to comply with the "fishable/swimmable goals" of the Clean Water Act (CWA), unless the requisite use attainability analysis (UAA) is conducted and adequately demonstrates that this goal is not attainable in which case the LTCP must then be developed to attain the highest attainable use. To this end, as part of the LTCP development process, NYSDEC and NYCDEP should work together to determine whether the "fishable/swimmable goals" of the CWA can be attained, and when the analyses show that the fishable/swimmable goal is not fully attainable, the highest attainable use and associated criteria should be identified. We envision that the resultant highest attainable use and level of protection would be established as the applicable standards by the State for each such water body. In these cases, a UAA would need to be completed to demonstrate that attaining the fishable and/or swimmable designated uses are not feasible based upon one or more of the six factors in 40 CFR 131.10(g) and to determine the highest attainable use.

EPA most recently articulated this position in its September 4, 2013 proposed rule, "Water Quality Standards Regulatory Clarifications." In summary, Section 101(a)(2) of the CWA

establishes the national goal that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water" be achieved by July 1, 1983. The EPA's longstanding interpretation is that the uses specified in section 101(a)(2) of the Act are presumed attainable unless a state affirmatively demonstrates through a UAA that 101(a)(2) uses are not attainable as provided by one of six regulatory factors in section 131.10(g). Further, if a UAA indicates that the current use is unattainable, the state will need to identify and assign the "highest attainable use," which should reflect the factors and constraints on the attainability of a use that were evaluated as part of the UAA process. EPA's regulations at 40 C.F.R. § 131.10(g) describe the factors used to support removal of a designated use or sub-categorization of use. The regulatory factors and the data analysis used to evaluate removing a use should also be used to determine the highest attainable use. Therefore, a UAA that effectively considers what is attainable in the future should guide the determination of the highest attainable use. EPA expects that a UAA will be sufficiently detailed both to fully inform public review of the revision and to lay out the data, analysis and logic that support the resulting highest attainable use. When adopting the highest attainable use, states must also adopt criteria to protect that use.

If you have any questions, please call me at (212) 637-3724.

Sincerely,

for Joan Leary Matthews, Director
Clean Water Division

CC: Gary Kline, NYSDEC