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August 31, 2009

Cynthia Giles

Assistant Administrator for Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

Ariel Rios Building

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Dear Ms. Giles:

The National Association of Clean Water Agencies (NACWA) appreciates this opportunity to provide written comments to the Office of Enforcement and Compliance Assurance (OECA) regarding development of a new Action Plan for Clean Water Act (CWA) enforcement. NACWA also appreciates the time your staff took on August 24 allowing NACWA members an opportunity to give input into the Action Plan. Representing nearly 300 of the nation's publicly owned treatment works (POTWs), NACWA is the leading advocate for the clean water utility community and provides an important municipal perspective to the current discussion surrounding CWA enforcement.

Improving Water Quality Must Be Main Enforcement Objective

NACWA members are true environmental stewards dedicated to improving the health and quality of our nation's waters. We believe that enforcement actions under the CWA must be focused on one overarching objective - improving water quality. NACWA, however, is concerned by the current trend in federal and state CWA enforcement that emphasizes the number of enforcement actions taken over the actual water quality benefits attained by such actions. This approach stresses the quantity of enforcement actions and the dollar value of fines and consent decree obligations as the benchmark of success, rather than determining if the resulting consent decrees and court orders actually result in water quality improvements. NACWA believes this approach is counterproductive, not only for the environment but also for the communities which are oftentimes forced to spend significant sums of local, ratepayer money on enforcement requirements that result in no measurable environmental improvement.

An additional problem created by the current focus on the quantity and expense of enforcement actions is that it has created a "one size fits all" approach to dealing with CWA enforcement issues. This uniform approach assumes that the same enforcement paradigm will work in all parts of the country, and that if a community spends a certain amount of money or constructs a specific type of infrastructure project then all of the existing water quality problems will be addressed. The fault

with this nationwide model is that it fails to account for the unique environmental needs of a given community, as well as the specific resources that a community may have available to address its water quality problems. It often also stifles innovative, green techniques that do not fit into the traditional enforcement methodology. The existing enforcement model is not a sustainable approach and will not address our nation's growing water quality problems. Given the shortcomings of the uniform approach, NACWA encourages OECA to move away from a national enforcement model and instead focus on tailoring enforcement actions to the unique needs of each community. Enforcement actions should be focused on the particular water quality issues of a specific area, taking into account the financial resources that a community has available and using those resources in the most responsible and strategic manner to achieve measureable water quality improvements.

One way to make CWA enforcement more protective of water quality and responsive to the needs of local communities is to look at enforcement issues from a watershed approach. By viewing water quality needs through the wide-view lens of a watershed, it allows an enforcement agency to see all of the contributors, both point source and nonpoint source, which contribute to water quality impairment. An enforcement initiative that is carried out within the framework of a larger watershed is more likely to result in actions that reflect the true impact a POTW has on its surrounding environment and provide a municipal clean water agency with the ability to target resources in innovative ways. Such flexibility, for example, would be more able to address sources of nonpoint pollution and result in meaningful water quality improvements. NACWA has done significant work over the past few years looking at the need for a watershed approach to confront the nation's growing water quality problems, including our 2007 *Strategic Watershed Report* and more recent efforts to work on watershed legislation. We would be happy to share a copy of our *Report* with OECA and to talk with you and your staff more about the importance of a watershed approach in enforcement actions.

Enforcement of Wet Weather Issues Must Be Consistent and Predictable

Another area of concern for NACWA regarding current enforcement efforts is the lack of consistency between EPA Regions and states in how certain treatment technologies or practices at POTWs are regulated for enforcement purposes. These discrepancies often mean that a particular treatment technology or practice is approved for use in one part of the country but, unpredictably, can be deemed unacceptable or illegal in a different part of the country. Nowhere is this more apparent for the clean water community than in enforcement actions surrounding sanitary sewer overflows (SSOs). The lack of an SSO rule has forced communities to make decisions and costly infrastructure investments to deal with SSO issues, oftentimes with EPA or state approval, only to later face the possibility of enforcement action because EPA has suddenly reversed its prior position and determined a particular technology or practice to be illegal.

This uneven enforcement playing field is particularly true in the case of peak wet weather flow treatment, more commonly called blending. Many municipalities with sanitary sewer systems have installed parallel treatment facilities at their POTW to treat additional flows during wet weather events that exceed the capacity of their main treatment facilities. The flows from these parallel systems are then recombined with the primary plant flow prior to discharge and the combined plant effluent meets or exceeds all applicable discharge permit standards. The parallel treatment systems often cost tens of millions of dollars to build and have been installed to ensure the highest level of treatment possible, particularly during wet weather events. In many cases these parallel treatment systems were also approved for use by EPA.

Utilities, however, in Regions 7 and 10 have recently been informed that use of these parallel treatment systems is now considered illegal and that POTWs utilizing them to treat wet weather flows will be subject to CWA enforcement action. This new enforcement position, which we understand has been endorsed by OECA, is

being unfairly applied to utilities in Region 7 and 10 and seeks to punish POTWs that have acted in good faith to provide wet weather flows with the highest level of treatment possible. It is also a perfect example of how inconsistent enforcement policies, applied in some Regions but not in others, can have an uneven and disproportionate impact on municipal utilities. NACWA strongly encourages OECA to revise the current enforcement posture in Regions 7 and 10 regarding peak wet weather parallel treatment systems and to work with the Office of Water on development of a comprehensive SSO rule to provide communities with a greater level of consistency regarding SSO enforcement.

Additional Coordination Necessary Between OECA and Office of Water

NACWA also believes it is critically important that OECA work more closely with the Office of Water in coordinating EPA's water program functions and CWA enforcement functions. There has been a growing disconnect between the actions of the Office of Water and the CWA enforcement priorities of OECA since the program office and enforcement office were separated. This lack of coordination and communication between the two offices has increasingly led to municipal consent decrees and other enforcement actions crafted by enforcement officials who would benefit greatly from the policy and programmatic expertise of officials in the Office of Water. This, in turn, often results in consent decrees and enforcement orders that place unrealistic demands on communities. Additionally, the lack of coordination between the program and enforcement offices can create complications for clean water agencies when their permit is written by one office that intended the permit to be read in a particular way but enforced by another office that interprets the permit differently. NACWA requests that OECA and the Office of Water make additional efforts to improve the coordination of their efforts and priorities to create a pragmatic enforcement regime that accounts for the unique challenges facing municipal wastewater utilities and makes water quality improvement the overarching objective.

Comments on Administrator Jackson's July 2 Memo

NACWA has reviewed Administrator Jackson's July 2 memorandum *Improving Water Quality Transparency and Effective Enforcement of Clean Water Act Requirements*, which directs OECA to develop an Action Plan for improving clean water enforcement. While NACWA is broadly supportive of the goals outlined in the memo, we have additional specific comments regarding the three main focus areas of transparency, raising the bar for clean water enforcement, and moving information technology into the 21st century.

Transparency – NACWA believes a critical element to improving the transparency of CWA enforcement is to ensure that water quality data is collected and reported as accurately as possible. The use of inaccurate data in enforcement actions is not only a disservice to the regulated community but also to the public at large. Additionally, inaccurate data makes it harder for the public to understand the water quality issues affecting their communities and the roles of their local, state, and federal governments in maintaining and improving water quality.

Many NACWA members have experienced problems with data accuracy in the past, especially with EPA's Enforcement and Compliance History Online (ECHO) database. Members describe multiple instances of reported violations in the ECHO database that never actually occurred and that were the result of errors made

on the part of enforcement agencies during data entry.¹ Additionally, many NACWA members have had a very difficult time in getting the ECHO errors corrected. These kinds of issues must be resolved if there is to be greater transparency in the enforcement process. Utilities expend considerable effort to prepare and submit accurate monitoring reports. They should not be responsible for auditing the accuracy of EPA database information to defend their compliance record, especially when the errors are the result of faulty inputs to the database by enforcement agencies. The data entered in ECHO needs more internal review. NACWA believes OECA must focus on developing quality assurance and quality control tools to ensure data accuracy.

An additional element of transparency is making water quality information available to the public in a way that the public can understand. To accomplish this, NACWA encourages OECA to work with the states and the Regions to develop easily accessible online water quality databases and/or websites to help the public better understand water quality issues. Existing websites such as Philadelphia's www.phillyrivercast.org, Toledo, Ohio's www.toledowaterwaysinitiative.com, and the Massachusetts Water Resources Authority's www.mwra.com/harbor/html/bhrecov.htm are good examples of easily accessible and understandable public information sources on local water quality issues. Such websites increase public transparency about how water quality issues are being addressed at the local level and provide the public with information to make their own decisions about engaging in recreational activities on or around local waterways.

Raising the Bar for Clean Water Enforcement – From the perspective of the municipal POTW community, the enforcement bar is already quite high. As outlined in our comments above, NACWA believes OECA's efforts to "raise the bar" on enforcement must not focus on the quantity or dollar value of the enforcement actions carried out but instead emphasize actions that actually result in water quality improvements. This means moving away from a prescriptive approach and instead focusing on the specific needs of a given community and structuring a consent decree or enforcement order to utilize the community's available resources in a strategic manner that will result in measurable water quality improvements.

The old "business as usual" enforcement model focused on quantity instead of quality simply will no longer work. In developing any new enforcement initiative, it is imperative OECA understand that public clean water utilities are dedicated to delivering quality of life enhancement for their communities and that every dollar spent by a community as a result of an enforcement action must go to projects that are based on sound science and that will result in measurable water quality improvements. Forcing utilities to spend money on projects that will not result in water quality improvements is not only a waste of a community's resources but also is a missed opportunity to achieve real environmental improvements. As such, NACWA believes any new enforcement plan adopted by OECA must include a way to measure success based on the value of the dollars spent to increase water quality and not simply on the number of enforcement actions carried out. Additionally, a new enforcement approach will require a greater emphasis by enforcement agencies on the contributions of agriculture and other nonpoint sources to water quality impairments.

Moving Information Technology Into the 21st Century – As mentioned above in the transparency discussion, NACWA favors any efforts by OECA to make information about enforcement and water quality issues more accessible to the public via online websites or databases. One idea OECA has suggested is moving away from paper reporting requirements for permitted facilities and instead instituting an electronic reporting system. NACWA is

¹ NACWA has an extensive list of actual errors in the ECHO database and would be happy to share these specific examples with OECA staff. Please contact Nathan Gardner-Andrews, NACWA's Counsel, at ngardner-andrews@nacwa.org if you would like more information about these examples.

generally supportive of this approach, particularly if it would allow POTWs to directly input their own information into enforcement databases and thus hopefully reduce the number of errors that currently plague existing databases such as ECHO. However, NACWA cautions that if an electronic system is used to determine compliance, it is essential that the correct permit limits for a particular facility are entered correctly into the system and that compliance is determined in accordance with the methods specified in a facility's permit. Additionally, moving to an electronic reporting system will not automatically improve the problem of making the data more easily understood by the public. Thus, even with electronic reporting, OECA must still work with the states and the Regions to develop ways to make the reported data more easily understood by the public.

NACWA's members are on the frontlines of environmental protection and share OECA's goals to improve the transparency and effectiveness of clean water enforcement. NACWA can be a partner and a resource for OECA and state enforcement agencies in this effort and we encourage you to take advantage of the knowledge and experience of our members in finding ways to improve our nation's water quality. We look forward to working with you and your staff in the months and years to come. Thank you again for the opportunity to provide these comments and please do not hesitate to contact me or any member of my staff if you have questions or if we can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'K Kirk'.

Ken Kirk
Executive Director

Cc: Lisa Jackson, Administrator
Peter Silva, Assistant Administrator, Office of Water