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Water Docket

U.S. Environmental Protection Agency, Mail Code: 4203M

Office of Water

1200 Pennsylvania Ave. NW

Washington, DC 20460

Via Electronic Mail: OW-Docket@epa.gov

Re: EPA Draft Integrated Planning Approach Framework

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) draft integrated planning framework (Framework), dated January 13, 2012. The goal of the Framework – to allow a utility the flexibility to consider all its water-related obligations together, assess its financial capability to address these obligations, and then prioritize investments to maximize water quality improvement – promises a more reasonable and sustainable approach to meeting the goals of the Clean Water Act (CWA). NACWA commends EPA for listening to the clean water community and municipalities nationwide that have raised the concern that the Agency is demanding too much, with every requirement being a top priority. EPA's efforts to expedite the drafting of the Framework and its commitment at the highest levels to ensure that the Agency speaks with one voice on the issue are a clear acknowledgement of the fact that the current clean water regulatory approach is unsustainable, and that the Nation's municipalities demand and deserve a new, more sustainable approach.

EPA's Framework presents a valuable opportunity to see what more can be done to address the concerns of the clean water community within the current bounds of EPA's policies and the CWA. NACWA is committed to seeing whether the approach contemplated by EPA will succeed and is ready to work alongside EPA and any willing communities that choose to explore this planning approach. NACWA's members see this as a potential opportunity to be creative in their efforts to prioritize and ultimately achieve greater, tangible environmental benefits for the watershed, rather than be required to undertake projects that result in little or no benefits to their communities.

In addition to the comments below, NACWA supports the comments submitted by the Municipal Integrated Planning Alliance.

Next Steps are Critical to the Success of the Framework

The success of the Framework will be dictated by the Agency's efforts over the next few months. Beyond issuing another draft of the Framework, EPA must work together with the clean water community through NACWA, the U.S. Conference of Mayors, and other groups to determine whether the Framework can actually provide meaningful results. NACWA was encouraged that EPA was considering a pilot program for the Framework, but understands that EPA is now simply planning to publish a compilation of case study examples of existing efforts that resemble integrated planning. Based on reaction from its membership, NACWA is unsure of the extent to which communities are willing to embark on this massive undertaking without some understanding from EPA that the early adopters will need additional assistance and guidance throughout the process.

Whether there is money to support a few pilots or not, EPA needs to consider what it can do to encourage communities to step forward. Beyond those communities that are facing imminent federal enforcement, others that are struggling to come into compliance with the CWA may be reluctant to call attention to themselves. Communities that are currently in compliance with the CWA and are interested in trying integrated planning to help them meet both existing and forthcoming regulations, will have little motivation to try something different if they are on their own with no guidance or support from the Agency. Highlighting a few existing efforts that EPA believes are consistent with the Framework's approach will not provide sufficient motivation for those communities interested in using the Framework.

It is also critical that EPA provide sufficient support and guidance to the states in helping them facilitate an integrated planning process for those communities that are interested. In the vast majority of situations, the most direct regulatory body a clean water utility will be interacting with to pursue an integrated plan will be a state agency, not EPA. Whether the integrated planning effort is ultimately successful will depend in large part on how effective the states are in working with interested communities. NACWA is concerned based on comments at the recent listening sessions that many states are unsure of their role in this process and uncertain about their ability to help implement the Framework. EPA must work with the states to ensure they can be active partners with both local communities and the Agency in pursuing an integrated planning approach.

Finally, it is essential that EPA follow through on its commitment made during the workshops to ensure that all of its regional offices are fully engaged on this issue and are providing feedback and oversight consistent with Headquarters.

NACWA's Top Concerns with the Principles and Elements of the Framework

NACWA members participated in each of the five EPA workshops around the country and provided input on the Framework that reflects the general sense of the membership on this issue. NACWA's comments below on the Framework itself focus on the Association's top concerns and issues:

- The Framework presents a viable opportunity to explore true watershed planning by bringing stakeholders together to develop and implement a comprehensive, integrated plan that is locally driven by needs at the watershed level. It was clear from the workshops that state regulators and utilities would like to see these plans coordinated with, or otherwise connected to, existing programs like CWA Section 208 planning activities and total maximum daily load (TMDL) development, to ensure consistency and

potentially to build off of these existing programs. The Framework should stress the importance of this coordination.

- How this new planning effort dovetails with existing CWA program activities is a key concern. If review and approval of these integrated plans is perceived by state regulators as an additional burden, the entire effort is likely to fail before it even gets started. Experience with negotiating consent decrees in the past has shown that the detailed and complex information that EPA is requesting will take time and resources to review – two things that state regulators don't have in surplus. EPA has stressed that the states have the lead on integrated planning throughout the workshops, but it must not let this effort fail simply because the states don't have the resources.
- The scope of the Framework has been limited to CWA requirements, but NACWA is encouraged by recent remarks by EPA staff that the costs associated with drinking water obligations can be considered when evaluating the financial capability of a community. NACWA urges EPA to explicitly include this option in the final Framework.
- The integrated planning Framework should enable and encourage municipal plans to employ an adaptive management approach. Identified investments and milestones should be based on achieving the greatest net environmental benefit, but flexible enough to adapt to changing economic conditions, technological advances, and water quality conditions. The plans should not simply be static schedules of what will be done over a given period of time. At the same time, however, the plans must provide enough certainty for the relevant municipalities, states and federal entities that the requirements or goals will not change unexpectedly during implementation to allow for long-range planning and investment. Adaptive management should ensure the certainty of the goals and direction, yet always maintain the flexibility in how we achieve those goals and objectives.

Though many NACWA members believe that longer-term permits (10 or even 20 years) are needed for this type of planning, implementing an integrated plan within the current CWA constraints of a 5-year permit cycle can provide for periodic revisiting of the plan and engagement of local stakeholders. Striking the right balance between an appropriate level of adaptive management based on results and stakeholder input and providing long-term certainty and protection from third party lawsuits will be critical.

- NACWA was encouraged by EPA's remarks during the workshops, but again stresses that integrated planning efforts should include an evaluation of the water quality standards (criteria and uses) that will be used as the foundation for plan investments to ensure that the underlying standards used as goals are achievable. Getting the targets right from the outset will be a critical component of the planning process. Use attainability analyses (UAA) and other existing CWA tools already available through current implementing regulations, policy and guidance should be used to their full extent.
- In assessing the extent to which particular control requirements provide environmental benefit, EPA needs to apply a broad definition of benefit, especially for green infrastructure and other innovative technologies.

- NACWA remains concerned with Element 2 of the Framework, despite EPA's efforts to downplay the significance of the information they are requesting through the description of the systems that would be included in the plan. The extent to which utilities are required to provide detailed inventories of all their areas of potential noncompliance will be a major impediment to the success of the Framework.
- The lack of a clear national policy on sanitary sewer overflows (SSOs) and peak wet weather treatment will hinder implementation of the integrated planning Framework. Continued adherence to the Agency's existing 'zero overflow' and 'blending as a bypass' policies, without clear federal statements on how these issues should be addressed, will lead to a disproportionate emphasis on addressing these issues within integrated plans, which should focus on net environmental benefit.
- NACWA understands that EPA is trying to keep the Framework simple, but comparing project alternatives and evaluating environmental and human health benefits, including the identification of criteria for this evaluation (Element 4), will be a major undertaking. This is an area where additional guidance will be necessary and will provide EPA and the states with increased consistency in the plans they must review. This is an area where EPA can collaborate with NACWA, the U.S. Conference of Mayors, the Water Environment Federation and others.
- With reliance on an evaluation of affordability, the underlying financial capability assessment approaches currently used need to be revisited. The Framework must be premised on maximizing benefits for investments made. Current financial assessments are based on an expectation that communities will spend to a certain level. EPA should revise the Framework to indicate that communities should not be required to spend more than two percent of their median household income on all water-related obligations, regardless of whether all such obligations are included in an integrated plan or in another implementation mechanism.

In addition, a comprehensive assessment of long-term debt and benefit of resource allocation needs to have a more prominent role in decision-making instead of the traditional individual cost benefit analysis of projects or programs.

EPA Must Continue to Explore Implementation Options for Integrated Planning

EPA continues to insist that implementation of an integrated plan is limited to one of three instruments – CWA permit, administrative order, or consent decree – or some combination thereof. NACWA, however, requests that the Agency continue to explore other options and remain open to creative solutions that may be identified through early implementation. NACWA was discouraged to hear EPA state during the workshop in Chicago that the choice of an implementation mechanism would be dictated by the particular circumstances – communities with compliance issues will be forced into the enforcement world (i.e., consent decrees) and only those communities that pursue integrated planning to help meet current and future obligations will be able to use permits. While it ultimately may be advantageous for a community with compliance issues to step forward with a plan for addressing those challenges – essentially creating a consent decree on its own terms and handing it to the government – only those communities facing imminent federal enforcement may be willing to take this leap of faith. If EPA is willing to consider other implementation options for these communities, there may be a greater willingness to volunteer.

For any of the implementation options, the ultimate plan must provide for long-term certainty. The consent decree option clearly provides this certainty, but it also provides little opportunity for stakeholder involvement – a key element of EPA's Framework – after the initial plan has been established. When using permits, which provide a more regular opportunity for input, EPA has discussed the use of a compliance schedule to ensconce the long-term integrated plans and key milestones, with the appropriate provisions being 'peeled off' and incorporated into the permit based on the schedule outlined in plan. While EPA has identified what it views as impediments to the use of long-term compliance schedules, there is more flexibility in this approach than the Agency has thus far acknowledged. In addition to providing consistency/predictability for both parties in implementing the plan over time, it is also important to ensure that any utility that is diligently implementing its plan is adequately protected from citizen suits.

Consent decrees have some advantages over a purely permit-based approach or even a hybrid approach using administrative orders and CWA permits. The predictability and protection provided by the consent decree may be preferred by some communities. Nevertheless, any community that voluntarily steps forward with an integrated plan must have some input into the mechanism or mechanisms used to implement its plan. Where consent decrees are found to be the most appropriate for implementation, EPA should craft a consent decree that would better reflect the voluntary nature of this planning process and substantially reduce the transaction costs for all parties involved. The approach to negotiating/entering consent orders must be less time and resource intensive than the current process and must only require the minimum amount of fines or penalties necessary for a lawful decree.

Finally, the EPA Framework needs to address how communities with existing consent decrees can amend/reopen those decrees to incorporate approved integrated plans. Reopening a decree to include an approved plan must be handled on a "fast track" and must be done in the most streamlined and efficient manner possible.

Broader Change Still Needed

As EPA staff has said numerous times during the Agency's workshops on the Framework, this effort is, in part, about starting an open and productive dialogue among municipalities, the states and EPA on the best way to meet CWA obligations to maximize water quality benefit and minimize economic impact on the community. Simply by drafting the Framework and acknowledging that there is significant flexibility inherent in current CWA authorities, EPA has provided a foundation for improving the way the goals of the CWA can be met. It is unclear, however, the extent to which the Framework will provide a clear pathway toward greater environmental results for many in the clean water community. For those communities that are facing imminent federal enforcement or perhaps are already in negotiations with the government, the Framework will likely provide a pathway for the community to present a more locally-driven plan for meeting its obligations. Unfortunately, many of the communities that could benefit from this type of flexible approach are already under consent decree.

For those clean water agencies that are facing obligations outside of the wet weather arena (combined and sanitary sewer overflows (CSOs and SSOs) as well as stormwater), including Clean Air Act requirements for sewage sludge incineration, or that do not have authority over the entire collection system and stormwater program, the Framework will not provide all the flexibility these communities need. It is also clear that the Framework is focused primarily on the sequencing of investments to meet current Agency policy regarding

CSO, SSO and stormwater compliance (e.g., four to six CSOs and zero SSOs), and does not contemplate a true cost-benefit approach to determining where community resources are best spent to achieve water quality. While EPA staff has highlighted during the integrated planning workshops existing CWA tools like UAAs, variances, and compliance schedules that can help to provide added flexibility, there is little assurance that past Agency resistance to the use of these important tools will change.

Broader change, beyond what is contemplated in the Framework, will still be needed to truly provide for a more holistic, watershed approach to addressing water quality challenges. EPA could change many of its existing policies to provide greater relief to the clean water community and still remain true to the goals and authorities of the CWA, but there are undoubtedly statutory barriers to a more forward-looking approach that will need to be addressed in the future. The current Framework does provide an opportunity to prove that better results can be achieved with a better vehicle, and ultimately may help make the case for this broader change.

* * *

Again, NACWA appreciates EPA's recognition that its past practices need to change and that the clean water community needs additional flexibility as it works to improve water quality. The *Framework* is a good first step and NACWA is committed to seeing whether the approach contemplated by EPA can succeed in providing a more reasonable approach to improving water quality. NACWA is ready to work alongside EPA and any willing communities who choose to explore this planning approach.

Sincerely,

A handwritten signature in black ink, appearing to read "K Kirk". The signature is stylized with a large "K" and a cursive "Kirk".

Ken Kirk
Executive Director