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April 25, 2022

Ms. Sonia Brubaker
Office of Wastewater Management, Water Infrastructure Division
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Guidance: Proposed 2022 Clean Water Act Financial Capability Assessment - Docket ID No. EPA-HQ-OW-2020-0426

Dear Ms. Brubaker:

On behalf of the nation's mayors, cities and counties, we appreciate the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA or the Agency) Proposed 2022 Financial Capability Assessment (FCA) Guidance, which would replace the *1997 Combined Sewer Overflows—Guidance for Financial Capability Assessment and Schedule Development* (1997 FCA Guidance) used to evaluate a community's capability to fund Clean Water Act (CWA) control measures in both the permitting and enforcement context. As you know, this issue, together with the *Integrated Planning for Municipal Stormwater and Wastewater* framework, has been a priority for our organizations and members since before the first Guidance document was released in 1995.

Collectively, our organizations represent the nation's 3,069 counties, 19,000 cities and the mayors of the 1,400 largest cities throughout the United States. The health, well-being and safety of our citizens and communities are top priorities for us. Local governments serve as co-regulators in implementing and enforcing many federal laws with states, including the Safe Drinking Water Act (SDWA) and CWA, and our members take these responsibilities seriously.

Protecting public health, however, is just one of the areas that local governments are charged with. Other priorities include education, public safety, housing and economic development, to name a few. All of these responsibilities must be balanced against each other with the knowledge that local budgets are funded through local tax revenue and ratepayers and must be balanced each year.

We are disappointed and concerned that EPA decided to withdraw the 2020 Proposed FCA Guidance. Our organizations and others worked closely with the Agency to develop guidance policy that balanced public health and environmental priorities with the financial realities that

many communities face, and we believe the revised FCA signed by Andrew D. Sawyer, Director, EPA's Office of Wastewater Management on January 12, 2021, largely supported the mutual priorities of both federal and local governments. ***Unfortunately, the newly proposed 2022 FCA Guidance is unworkable for local governments and we strongly urge EPA to withdraw the 2022 FCA Guidance in favor of the 2020 FCA Guidance for the reasons outlined below.*** If EPA insists on continuing to develop the 2022 proposal, we strongly suggest adopting the below recommendations while also engaging in close consultation with our organizations to develop a more acceptable 2022 FCA Guidance.

Therefore, we respectfully submit the following items for consideration:

Local governments fund the majority of water infrastructure investments.
Local governments fund 98 percent of all capital, operations and maintenance investment in drinking water and wastewater infrastructure, primarily through user fees and long-term borrowing including loans and bonds. The most recent U.S. Census data shows that local governments spent over $134.6 billion on water and wastewater in 2019 alone, and, from 1993-2019, spent over $2.38 trillion, not adjusted for inflation. Even with this significant investment by local governments, many communities struggle to upgrade their water and wastewater utilities.

During roughly the same time period the federal government has only appropriated approximately $2 billion annually for both the Clean Water and Drinking Water State Revolving Loan Fund (SRF) programs. The SRF programs provide grants to states which, in turn, provide local governments with loans that must be repaid.

While we appreciate that the bipartisan Infrastructure Investment and Jobs Act (also known as the Bipartisan Infrastructure Law or BIL) provided additional funding for our nation's water infrastructure – including $11.7 billion over five years for the Drinking Water SRF, $11.7 billion over five years for the Clean Water SRF, $10 billion over five years for grants to address PFAS and other emerging contaminants in drinking water and $15 billion to remove lead pipes –this still represents a small percentage of the overall nationwide need. Further, it is only a fraction of the yearly investments made by local governments to operate, maintain and rebuild our water, wastewater and stormwater systems.

Like the 2009 American Recovery and Reinvestment Act, this "historic" level of federal funding for capital investments to upgrade America's water infrastructure will likely be seen over the long-term as a bump in the overall infrastructure investment graph. For this reason, BIL funding should not be used as a justification to impose additional federal mandates on local governments or the residents they serve.

Further, this proposed 2022 FCA Guidance should be measured by how well it relieves the burdens imposed by the 1997 FCA Guidance, which have been demonstrated to place a significant and widespread financial burden on households, particularly those that can least afford it. Revising the 1997 FCA Guidance presents an opportunity for a policy change that could significantly and meaningfully reduce the burden on low-income households and environmental justice communities.

These are the arguments that our organizations presented to EPA and the U.S. Department of Justice (DOJ) in 2009 when communities were facing costly environmental mandates in the form of consent decrees, administrative orders and numerous unfunded mandates that posed an undue financial burden on our most vulnerable citizens. By working together for over a decade, we identified key barriers and developed tools to assist local leaders with our mutual goals of protecting public health and the environment in a cost-efficient manner. As a result of our combined efforts, we promoted the use of green infrastructure, developed integrated planning and helped design a FCA Guidance in 2020 that was a vast improvement over the 1997 FCA Guidance.

EPA's most recently proposed guidance is a disappointing step backwards in the work that we have been doing together since 2009, and we strongly recommend that EPA withdraw the proposed 2022 FCA and instead put forth the 2020 FCA Guidance in its place.

The proposed 2022 FCA sets an outer limit of 25 years for funding and building major construction projects needed to come into compliance with CWA regulatory requirements, which could have major unintended consequences for local governments.

While we have a variety of issues with the proposed 2022 FCA, the limitation on implementation schedules is one of our top concerns. To summarize our concerns, EPA's proposed 2022 FCA Guidance would establish a rule of general applicability that would limit compliance schedules to no more than 25 years, no matter what projects need to be built or the financial condition of the community. This limitation will harm low-income communities and is inconsistent with more than a decade of EPA practice. Further, by imposing such a limitation across the board would be an illegal rule adopted in violation of the Administrative Procedure Act (APA).

The proposed 2022 FCA also would deny *any* extended schedule until a local government proves to EPA's satisfaction that it cannot deploy alternative rate structures, assistance programs, or find additional funding. This proposal puts EPA enforcement staff in the premiere role of both state and local governance, and in direct regulation of households in America's cities.

Below we expand on these five concerns related to implementation schedules. For these reasons, we strongly urge EPA to withdraw the 2022 FCA Guidance. If EPA insists on continuing to

develop the 2022 proposal, we strongly suggest making drastic changes based on the five arguments outlined below.

1. ***Impacts on low-income families***

We appreciate that, like the 2020 FCA, the proposed 2022 FCA recognizes and allows consideration of the adverse impacts to ratepayers with the lowest quintile of income. Unfortunately, the proposed 2022 FCA removes an important tool for EPA to address these impacts: schedule flexibility.

EPA notes that it is proposing to limit compliance schedules to 25 years due to its concern over disproportionate environmental impacts on disadvantaged populations. That concern is misplaced. As EPA states in the proposed 2022 FCA, the Agency already assesses public health and environmental considerations when developing CWA implementation schedules, including consideration of public health impacts in low-income and overburdened communities. EPA and local governments have long prioritized projects with the greatest public health and environmental benefits. For example, some consent decrees prioritize elimination of sanitary sewer overflows (SSOs) that result in exposure to raw sewage, while others, such as the 2016 amendment to the Evansville, Indiana, consent decree, expressly take environmental justice into account when identifying projects for prioritization.

The principle of addressing the greatest risks first is incorporated into the 2012 Integrated Municipal Stormwater and Wastewater Planning Approach Framework, which recognizes that local governments addressing multiple CWA obligations at once and communities employing green infrastructure approaches often need extended compliance schedules. The Integrated Planning Framework addresses potential impacts during a compliance schedule by stating that: "Where an extended time frame is necessary to achieve compliance, enforcement orders should provide schedules for CWA requirements that prioritize the most significant human health and environmental needs first." The Integrated Planning Framework was incorporated by reference into the Clean Water Act in the 2019 Water Infrastructure Improvement Act (P.L. 115-436) to ensure that EPA continues to offer local governments the flexibilities offered in that Framework.

Given that compliance schedules can and do prioritize risk to human health when sequencing projects, the proposed 25-year limit only serves to harm low-income families. Our organizations and others have demonstrated to EPA that families with incomes in the lowest quintile pay a much greater share of their income for sewer services. Higher bills can force families to choose between paying for food and rent or paying for utilities. Subjecting families to this dilemma can further erode the affordability of clean water infrastructure, as delinquent accounts increase, and utility revenues decrease. If EPA refuses to allow compliance schedules that address affordability, EPA will be worsening conditions for the disadvantaged.

As noted in a September 2020 Executive Summary of New York City's Open Waters Long Term Control Plan, an extended compliance schedule can avoid disproportionately burdening low-income families. In that Executive Summary, New York describes challenges caused by the COVID-19 pandemic that resulted in a significant increase in delinquent accounts and an 8% reduction in revenue. According to that document, the City's Department of Environmental Protection "has begun to reach out to DEC (Department of Environmental Conservation) and EPA to discuss mandated work so that design and construction schedules can align with expected revenues and expenditures on mandated work are balanced with sound investment in existing water and wastewater infrastructure."

2. Inconsistency with a decade of policy and practice

Over the past decade, EPA has become more sensitive to the realities of financing costly water infrastructure projects and has allowed longer compliance schedules where warranted. Limiting a compliance schedule to 25 years ignores those realities and is inconsistent with past policy and practices.

As we and others have explained to EPA, large water infrastructure projects are typically debt-financed. A local government borrows money and repays the loans over time by increasing rates, also over time. Every local government has a finite ability to incur debt. A compliance schedule can address this limitation and avoid rate shock by scheduling projects in a sequence that allows a local government to borrow, build, and retire debt, then borrow, build, and retire debt again, until all the needed capital improvements are made.

Alternative 2 of the proposed 2022 FCA allows the use of dynamic financial and rate models to support such an analysis. However, the proposed 2022 FCA would constrain their use to develop compliance schedules that take into account both affordable rates and borrowing capacity.

The proposed 2022 FCA claims that limiting compliance schedules to 25 years is consistent with "past FCA practice." We are uncertain as to what this is in reference to–is EPA trying to turn the clock back on its past decade of effort in better understanding of affordability issues?

Nevertheless, it is clear that an arbitrary 25-year limit on compliance schedules is ***inconsistent*** with many completed CWA compliance and enforcement actions, including:

- Under a series of consent orders issued by New York State to New York City, the City has developed long term control plans that, from the date of the first order in 1992, provide 55 years to address combined sewer overflows (CSOs).
- The 2019 amendment to the consent decree for Sanitation District No. 1 of Northern Kentucky provides a 33-year compliance schedule.

- The Integrated Overflow Control Program for the Unified Government of Wyandotte County and Kansas City, Kansas, approved by EPA Region 7 in March 2020, provides a 31-year compliance schedule.
- The 2021 third amendment to the consent decree for Kansas City, Missouri, extended its 25-year compliance schedule to 30 years, based on affordability.
- The 2016 third amendment to the consent decree for the City of Evansville extended its 22-year compliance schedule to 29 years, based on affordability.
- Orders or consent decrees for Lancaster, Pennsylvania (2017), Gary, Indiana (2016), Scranton, Pennsylvania (2012), Philadelphia, Pennsylvania (2011), the Northeast Ohio Regional Sewer District (NEORSD) (2010), and Honolulu, Hawaii (2010) all have 25-year compliance schedules under CWA orders or decrees.

Under the proposed 2022 FCA it appears that there would be no extension of any of these 25-year schedules even if the local government demonstrates that it is experiencing increases in delinquent accounts and declines in revenues, changing its ability to incur and pay off the debt that finances major capital projects.

That stance would be inconsistent with past practices and with section 309(h) of the CWA, which expressly requires EPA and DOJ to give local governments the opportunity to seek to reopen a consent decree or administrative order to accommodate an integrated plan. It also would be inconsistent with the express terms of some consent decrees. For example, the 2015 consent decree with the Puerto Rico Aqueduct and Sewer Authority (PRASA) expressly provides for schedule extensions based on a demonstration of lack of affordability. PRASA currently has a 29-year compliance schedule. Will EPA now automatically deny any future requests for extensions from PRASA or from Lancaster, Gary, Scranton, Philadelphia, NEORSD or Honolulu?

3. Preempting State and Local Government Decision-Making

The proposed 2022 FCA states that before allowing "an extended schedule of up to 20 years, or 25 years for unusually high impacts" the community must convince EPA that "these impacts cannot be addressed through measures such as alternative rate structures, assistance programs or other sources of funding." In lieu of allowing schedule flexibility as a tool to address impacts on low-income households, EPA appears to be suggesting it can require local governments to offer differentiated rates and customer assistance programs, and to seek federal funding. This is a flawed assumption and a flawed policy for several reasons.

First, as EPA knows, state and local laws vary in dictating how local governments can raise and spend general fund dollars, as well as water utility funds and rates. For example, many state laws prohibit rate differentiation within a customer class of ratepayers. Some state laws expressly prohibit the use of general funds for water infrastructure, meaning that the water utility can only

spend what it raises in ratepayer revenue. Additionally, some communities are subject to rate-making authorities or have legal limitations on rates, including requirements that rates reflect actual costs of service.

Cities and counties use their budgets to meet a variety of legal obligations, including providing basic government services. Rather than recognize these realities and the limitations of local governments, EPA appears willing to prohibit an extended CWA compliance schedule if EPA believes, for example, the local government could have feasibly foregone a new fire truck, new school, or public housing upgrades in order to fund a community assistance program for water rates. In many communities, these are not trade offs, as they are funded through different revenue sources. EPA officials have said in the past that they do not want to concern themselves with the other expenditures that local governments must make. However, this guidance would do just that. Making local budget decisions is not a proper EPA function, and the proposed 2022 FCA language fails to account for the legal differentiation across states and local governments nationwide.

Second, regarding the ability of local governments to seek other sources of funding, it is important to note that decisions on the allocation of funds from the SRFs are made by states and the allocation of WIFIA funding is decided by EPA. In both scenarios, there is no guarantee that a community seeking an SRF or WIFIA loan will actually receive the financing. Furthermore, both the SRFs programs and the WIFIA program have more applicants than can be funded in any given fiscal year, and this is likely to continue even with the increase in funding for the SRFs through BIL.

With the high number of priority water infrastructure projects in communities across the country, cities and counties are eager to obtain low interest debt. The best overall financing options are not always federal programs. When tax-exempt general obligation or revenue bond rates are low, and the local government is making significant utility investments, the bond market is a less expensive financing option alternative to SRF loans. The 2017 tax reform law, however, prohibits the local governments from refinancing high-interest debt, and prevents local governments from taking advantage of cost-savings. So in effect, the only commonly used financing mechanisms are being curtailed, with the end result of making infrastructure projects more expensive overall for local governments. The proposed 2022 FCA language fails to account for the funding and financing realities for local governments.

Finally, the proposed 2022 FCA would put EPA enforcement staff in the position of making decisions far outside their area of expertise. EPA enforcement staff are not experts in managing local budgets, nor are they experts in debt financing. If consultants are hired to address questions related to budgets and financing, that would mean that city or county management would be

controlled by persons who are not accountable to anyone other than EPA. This result would be undemocratic and untenable.

4. Improper Use of Guidance

As a general matter, enforcement decisions are committed to the discretion of an agency and are not reviewable under the APA. *Heckler v. Chaney*, 470 U.S. 821 (1985). However, when an agency goes beyond case-by-case enforcement decisions and issues a generally applicable policy that affects rights and responsibilities, it cannot be shrouded in enforcement discretion. *OSG Bulk Ships, Inc. v. United States,* 132 F.3d 808 (D.C. Cir. 1998) (while individual enforcement decisions are generally not reviewable under the APA, a general enforcement policy is subject to review).

As such, the proposed 2022 FCA cannot set a generally applicable outer boundary for completion of projects to address CSOs and SSOs. If it did, the FCA guidance would be a spurious rulemaking adopted in violation of the APA. Courts have made it clear that this is true even if a guidance includes a disclaimer disavowing the creation of any rights and responsibilities. *See Gen. Elec. Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) (striking down PCB risk assessment guidance as legislative rule requiring notice and comment); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (striking down emissions monitoring guidance as legislative rule requiring notice and comment). The test is not whether an agency claims a guidance is not binding; the test is how EPA treats the document. The proposed 2022 FCA says compliance schedules are "not to exceed" 25 years. Even if a final guidance recharacterizes that limit as a "recommendation," if EPA enforcement staff tell local governments they cannot negotiate a consent decree with a compliance schedule longer than 25 years, that communication would be evidence that they are using the guidance to impose obligations on regulated entities without going through notice and comment rulemaking.

5. Impacts on Environmental Justice Communities

EPA acknowledges the need to balance financial and environmental impacts on disadvantaged communities, yet the proposed guidance heavily favors mitigating environmental impacts more quickly despite the financial burdens that this would impose on those same communities. EPA should additionally recognize that the financial burden on low-income and environmental justice communities associated with meeting environmental requirements is an important aspect of environmental justice. The financial burden that increased rates will have on disadvantaged communities should be a consideration in the proposed guidance. This burden can be alleviated by a longer implementation schedule.

While we believe the proposed 2022 FCA is unworkable for the reasons outlined above, we appreciate that EPA maintains the following local government priorities in the guidance document.

1. Support for Integrated Planning and Green Infrastructure

Our organizations and EPA designed the Integrated Planning Framework as a new approach to meeting Clean Water Act requirements in a more environmentally-efficient and cost-effective manner. We appreciate that in the proposed 2022 FCA, EPA strongly encourages communities to utilize integrated planning to help achieve compliance. We believe that Integrated Planning could be a vastly effective tool for local governments and we appreciate EPA's support for its use.

Incorporating green infrastructure as part of a community's long-term control plan to solve stormwater and wastewater issues was not an allowable tool prior to 2011. By working with the Agency, we were pleased when EPA issued an April 2011 memorandum to the Regional Offices that encouraged them to allow the utilization of green Infrastructure as a solution. We are pleased that this proposed 2022 FCA Guidance once again encourages communities to use green infrastructure and other innovative technologies to achieve compliance in a cost-effective manner.

2. Consideration of All Water Program Costs

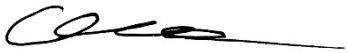
EPA proposes to consider wastewater, stormwater and drinking water costs as part of the FCA. Local governments strongly support including all water costs, including compliance with the SDWA and CWA, as part of the calculation for scheduling considerations and financial burden - this is something our organizations have supported throughout our work together on integrated planning and financial capability. Most residents do not differentiate between their drinking water and sewer costs, and the money they use to pay these bills comes from the same bank account. As a result, communities have to be mindful of raising rates on both water and sewer bills so as to not cause an undue financial burden on individual households. When EPA forces communities to engage in consent orders to address clean water issues without factoring in potential costs on drinking water requirements, many communities find they do not have the resources to comply with both CWA and SDWA requirements without financially overburdening their poorest and most vulnerable citizens.

3. Increased Transparency

EPA has improved the overall transparency of the CSO/SSO enforcement policy by reconsidering the 1997 FCA Guidance and making the financial capability assessment process less of a "black box" calculation for local governments when engaging with EPA regional offices and EPA/DOJ in consent decree negotiations. We urge the Agency to continue to work on the internal culture of the organization by integrating real-world factors and conditions as they strive to achieve specific water quality goals. It remains important for EPA to be more transparent about how they consider major social, physical, economic factors (such as economic downturns, public health pandemics and natural disasters) when setting compliance terms.

In conclusion, thank you for the opportunity to provide the local government perspective on this critical guidance to better determine community affordability. We strongly recommend that EPA withdraw the proposed 2022 FCA and to reissue the 2020 FCA Guidance. If you have any questions, please contact our staff: Judy Sheahan (USCM) at 202-355-8540 or jsheahan@usmayors.org; Carolyn Berndt (NLC) at 202-626-3101 or Berndt@nlc.org; or Sarah Gimont (NACo) at 202-942-4254 or sgimont@naco.org.

Sincerely,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